No. 04-373

Title:	Maryland, Petitioner v. Leeander Jerome Blake
Docketed:	September 17, 2004
Lower Ct:	Court of Appeals of Maryland
Case Nos.:	(81, September Term, 2003)
Decision Date:	May 12, 2004
Rehearing Denied:	June 16, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 13 2004	Petition for a writ of certiorari filed. (Response due October 18, 2004)
Oct 8 2004	Order extending time to file response to petition to and including November 17, 2004.
Nov 17 2004	Brief of respondent Leeander Jerome Blake in opposition filed.
Dec 1 2004	DISTRIBUTED for Conference of January 7, 2005.
Jan 7 2005	Record Requested .
Jan 25 2005	Record received from Court of Appeals Maryland (1 box).
Feb 24 2005	Record received from Circuit Court for Anne Arundel County and Court of Appeals Maryland (one envelope).
Feb 28 2005	DISTRIBUTED for Conference of March 4, 2005.
Mar 14 2005	DISTRIBUTED for Conference of March 18, 2005.
Mar 21 2005	DISTRIBUTED for Conference of March 25, 2005.
Mar 28 2005	DISTRIBUTED for Conference of April 1, 2005.
Apr 11 2005	DISTRIBUTED for Conference of April 15, 2005.
Apr 18 2005	Petition GRANTED.
May 23 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 9, 2005.
Jun 9 2005	Brief amicus curiae of United States filed.
Jun 9 2005	Joint appendix filed.
Jun 9 2005	Brief of petitioner Maryland filed.
Jun 9 2005	Brief amici curiae of Texas, et al. filed.
Jun 10 2005	Motion for leave to file amicus brief out of time filed by Criminal Justice Legal Foundation.
Jun 27 2005	Motion for leave to file amicus brief out of time filed by Criminal Justice Legal Foundation GRANTED.
Jul 1 2005	Extension of time within which to file respondent's brief on the merits to and including August 5, 2005.

Jul 20 2005	SET FOR ARGUMENT on November 1, 2005.
Aug 1 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Aug 5 2005	Brief of respondent Leeander Jerome Blake filed. (Distributed)
Aug 5 2005	Brief amicus curiae of National Legal Aid and Defender Association filed. (Distributed)
Aug 9 2005	CIRCULATED.
Aug 10 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 17 2005	Motion for leave to proceed further herein in forma pauperis filed by respondent.
Aug 24 2005	Motion for leave to proceed further herein in forma pauperis filed by respondent DISTRIBUTED for Conference of September 26, 2005.
Aug 29 2005	Motion out of time of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 8 2005	Reply of petitioner Maryland filed. (Distributed)
Oct 3 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Oct 3 2005	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument DENIED. The Chief Justice took no part in the consideration or decision of this motion.
Oct 3 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Nov 1 2005	Argued. For petitioner: Kathryn Grill Graeff, Assistant Attorney General, Baltimore, Md.; and James A. Feldman, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.) For respondent: Kenneth W. Ravenell, Baltimore, Md.
Nov 14 2005	Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.

Supreme Court, U.S.
FILED
04 373 SEP 13 2004
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

On Petition for Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. LISIC
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6428

Counsel for Petitioner

**Counsel of Record*

QUESTION PRESENTED

Leeander Blake was arrested on October 26, 2002, and charged with the first degree murder of Straughan Lee Griffin. At the police station, Blake invoked his right to counsel after being advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The police immediately ceased questioning and placed Blake in a holding cell. Thirty-five minutes later, Detective William Johns went to Blake's cell, gave him a copy of his arrest warrant and charging papers, and told Blake to read them carefully. Officer Curtis Reese, a patrol officer, walked with Detective Johns to the cell, and, after the paperwork was handed to Blake, said, "I bet you want to talk now, huh." Detective Johns shoved Officer Reese from the room, telling him that Blake had asked for an attorney and they could not talk to him. Approximately 30 minutes later when Detective Johns brought Blake some clothes, Blake asked, "I can still talk to you?" The detective confirmed that Blake wanted to talk to him, readvised him of his *Miranda* rights, and obtained Blake's waiver of his right to counsel. The Court of Appeals of Maryland held that there had been a violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). The question presented is:

When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

Page

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. This Court Has Not Decided Whether *Edwards* Allows for Consideration of Curative Measures or Intervening Circumstances in Determining Whether a Suspect Has Initiated Further Contact with the Police 8

II. This Court Should Sanction a Balanced and Pragmatic Approach to Alleged *Edwards* Violations 11

III. Lower Courts Are Inconsistent in Analyzing the Impact of an *Edwards* Violation 15

Page

IV. Public Policy Concerns Require This Court To Reject the Maryland Court's Application of *Edwards* 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Blake v. State, 381 Md. 218, 849 A.2d 410 (2004) 1, 3

Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992) 17

Correll v. Thompson, 63 F.3d 1279 (4th Cir. 1995) 17

Dunkins v. Thigpen, 854 F.2d 394 (11th Cir. 1988) 17

Edwards v. Arizona, 451 U.S. 477 (1981) .... i, *passim*

Johnson v. Zerbst, 304 U.S. 458 (1938) 9

Marks v. United States, 430 U.S. 188 (1977) 13

McFadden v. Garraghty, 820 F.2d 654 (4th Cir. 1987) 17

Page

Michigan v. Harvey, 494 U.S. 344 (1990) 14

Michigan v. Tucker, 417 U.S. 433 (1974) 19

Minnick v. Mississippi, 498 U.S. 146 (1990) . 14, 19, 20

Miranda v. Arizona, 384 U.S. 436 (1966) .... i, *passim*

Missouri v. Seibert, 124 S. Ct. 2601 (2004) ... 7, 11, 13

Oregon v. Bradshaw, 462 U.S. 1039 (1983) .. 6, *passim*

Oregon v. Elstad, 470 U.S. 298 (1985) ..... 7, *passim*

People v. Bradford, 929 P.2d 544 (Cal.), *cert. denied*, 522 U.S. 953 (1997) 17

People v. Winsett, 606 N.E.2d 1186 (Ill. 1992), *cert. denied*, 510 U.S. 831 (1993) 18

Rhode Island v. Innis, 466 U.S. 291 (1980) 5, 6, 7

State v. Crump, 834 S.W.2d 265 (Tenn.), *cert. denied*, 506 U.S. 905 (1992) 18

State v. Hartley, 511 A.2d 80 (N.J. 1986) 18

State v. Nash, 718 So.2d 269 (Fla. App. 1998) 17

State v. Plch, 826 A.2d 534 (N.H.), *cert. denied*, 124 S. Ct. 546 (2003) 15

Page

Constitutional Provisions:

United States Constitution:

Amendment V 2, 11
Amendment XIV 2

Statutes:

28 U.S.C. § 1257 1

Maryland Annotated Code:

Criminal Law Article, § 2-202 4
Courts & Judicial Proceedings Article, § 12-302 ... 8

Rules:

Rules of the Supreme Court, Rule 13 1

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Blake v. State*, 381 Md. 218, 849 A.2d 410 (2004), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-29a).

The unreported opinion of the Court of Special Appeals of Maryland, *State of Maryland v. Leeander Blake*, No. 771, September Term, 2003 (filed October 29, 2003), is reproduced in Appendix B. (App. 30a-58a).

The unreported opinion of the Circuit Court for Anne Arundel County, Maryland, in *State of Maryland v. Leeander Jerome Blake*, Nos. K-2002-2154, K-2002-2417, granting Blake's suppression motion, is reproduced in Appendix C. (App. 59a-87a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland was filed on May 12, 2004. The Court of Appeals denied a motion for reconsideration on June 16, 2004. This petition is filed within 90 days of the denial of the motion for reconsideration, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 19, 2002, Straughan Lee Griffin was shot and killed in front of his home in the historic district

of Annapolis. (App. 3a). His assailants shot him in the head, stole his automobile, and ran over his body as they fled the scene. (App. 3a).

On October 25, 2002, Terrence Tolbert was arrested in connection with the homicide and implicated Blake. (App. 4a). On the following day, October 26, 2002, the Annapolis Police executed a search warrant at Blake's home. (E. 226).[1] Prior to the search, Sergeant Greg Kirchner instructed all officers present at a briefing not to speak to Blake should they encounter him at the house. (E. 226). At 5:08 a.m., the authorities arrested Blake at his home. (App. 4a). Blake was transported to the Annapolis Police Department, where Detective William Johns advised Blake of his rights pursuant to *Miranda*. (App. 4a). Blake indicated that he did not want to talk to the police without an attorney. (App. 4a). Accordingly, Blake was placed in a holding cell at the police department at 5:25 a.m. and no further questions were asked of him. (App. 4a).

At 6:00 a.m. Detective Johns went to Blake's cell and handed him a copy of his arrest warrant and statement of charges,[2] explaining the charges to him, and telling him to

---

[1] The references herein to E. are to the Record Extract that was filed in the Maryland Court of Appeals in *Blake v. State*, 381 Md. 218, 849 A.2d 410 (2004).

[2] These computer-generated papers indicated that the death penalty was the maximum possible punishment for first degree murder. The crime at issue, a killing

read the document carefully. (App. 4a-5a). As Detective Johns turned to walk out, Officer Curtis Reese, a uniformed patrol officer with no connection to the investigation, who had walked back to the holding cell with Detective Johns, said, "I bet you want to talk now, huh." (App. 5a). Surprised by the unexpected comment, Detective Johns said, very loudly, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." (App. 5a-6a). Detective Johns then walked Officer Reese out of the cell block. (App. 6a). Detective Johns did not want Officer Reese to say anything more that could be heard by Blake and he did not want to hear anything Blake might say. (App. 6a). Detective Johns testified that Blake would have heard his admonition to Officer Reese. (E. 37). The detective then reported the incident to his supervisor, Sergeant Kirchner. (E. 38).

Approximately thirty minutes after giving Blake the charging papers, Detective Johns returned to the holding cell to give Blake clothes which had been delivered to the police department. (App. 6a). As Detective Johns was about to leave the cell, Blake asked, "I can still talk to you?" (App. 6a). Detective Johns asked whether Blake was saying that he wanted to talk to Johns. (App. 6a).

---

during a robbery and carjacking, qualified for imposition of the death penalty. A later determination as to the age and mental capacity of a given defendant might make that defendant ultimately ineligible, *see* Md. Ann. Code, Crim. Law, § 2-202 (2002), as was the case here, but that stage had not yet been reached at the time Blake received the papers.

Blake replied, "Yes." (App. 6a). Blake was returned to the interview room, read his rights again, and agreed to provide a statement without an attorney. (App. 6a).

Blake testified that he decided to talk to the authorities after hearing Officer Reese's comment and then seeing the charges he was facing, including a possible death penalty. (App. 7a). In addition, when he read the complete charges, he saw for the first time that Tolbert said that Blake was the shooter and the person who ran over the victim while leaving the scene. (E. 205-06). Blake felt angry and betrayed and wanted the police to know the truth. (E. 208).

On June 3, 2003, the suppression court issued an oral ruling granting Blake's suppression motion. (App. 59a-87a). According to the suppression court, Officer Reese's statement to Blake, after Blake had invoked his right to counsel, constituted the functional equivalent of interrogation, in violation of *Miranda*, *Rhode Island v. Innis*, 466 U.S. 291 (1980), and *Edwards*. (App. 72a-78a). The suppression court concluded that Detective Johns's actions immediately after Officer Reese's remark did not change that result. (App. 74a). The court also found that there was no showing of a voluntary waiver of the right to counsel. (App. 81a).

The Court of Special Appeals of Maryland reversed that ruling. (App. 30a-52a). The court found that Blake's statements were admissible at trial because Officer Reese's remark did not constitute interrogation and that Blake's subsequent waiver was voluntary. (App. 52a).

The Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals of Maryland. (App. 2a-3a). Based on its review of Supreme Court law subsequent to *Innis* and *Edwards*, including *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the court held that, pursuant to *Innis*, the comment of Officer Reese to Blake after Blake invoked his right to counsel was the functional equivalent of interrogation and not a rhetorical question. (App. 20a-22a). According to the court, Officer Reese's comment was directed at Blake and could only be read as encouraging Blake to speak. (App. 21a-22a). The court did not believe that the subsequent actions of Detective Johns cured the violation. (App. 26a-27a). Further, the court found "no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation." (App. 26a). The court held that Blake himself never initiated contact with the police after invoking his *Miranda* rights. (App. 27a).

REASONS FOR GRANTING THE WRIT

This case raises an issue that the Court has not yet addressed, but which is vitally important to both prosecutors and police. That issue is whether *Edwards* allows for curative measures or intervening circumstances to play a decisive role in determining whether a suspect has initiated further contact with the police.

The narrow, straitjacket approach employed by the Maryland court results in the unnecessary loss of critical evidence and should not be required under *Edwards*. Rather, this Court should recognize that, consistent with

Oregon v. Elstad, 470 U.S. 298 (1985), even when there has been a *Miranda* violation, *Edwards* allows for initiation of contact by a suspect with the police and waiver of the right to counsel after an earlier invocation of that right. The validity of such an initiation requires consideration of the totality of the circumstances, including curative measures taken by the authorities and any intervening circumstances between invocation and initiation of communications.[3] Recently in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), this Court fashioned just such a pragmatic analysis when the police failed to give any *Miranda* warnings. The same reasoning is appropriate in an *Edwards* analysis.

The draconian result mandated by the lower court and the divergence of opinion in lower courts as to whether an *Elstad* analysis would apply in the context of an alleged *Edwards* violation strongly suggest that guidance by this Court is needed. As a practical matter, and contrary to the reasoning of the Maryland court, any *Edwards* analysis must certainly take into consideration intervening circumstances and/or curative measures taken between invocation of the right to counsel and later waiver of the right, regardless of any prior impropriety. The Court should use this opportunity to re-examine *Edwards* and *Bradshaw* and offer a pragmatic, yet effective,

---

[3] Although the State contested in the courts below the issue of whether Officer Reese's statement constituted an interrogation within the meaning of *Innis*, the State is not presenting that question to this Court and is therefore assuming *arguendo* that it was interrogation.

prophylactic rule in assessing an alleged *Edwards* violation.

Police and prosecutors would be better served by a more pragmatic rule with fewer negative societal results. Indeed, in this case, it is especially critical to review the decision of the state court. In ordering suppression of Blake's statement, the court has not only deprived the State of critical evidence, but, under state law,[4] allowed Blake to go free, forever immune from prosecution for the murder of Straughan Lee Griffin.

I. This Court Has Not Decided Whether *Edwards* Allows for Consideration of Curative Measures or Intervening Circumstances in Determining Whether a Suspect Has Initiated Further Contact with the Police.

This Court has not yet addressed a recurring issue presented to lower courts and law enforcement: when a police officer initiates contact in violation of a suspect's earlier invocation of the right to counsel, may curative measures or intervening circumstances result in a finding that the suspect has initiated contact with the police and that there has been no *Edwards* violation?

---

[4] Maryland law mandates that, if the State unsuccessfully appeals an unfavorable ruling by the suppression court, the charges against the defendant must be dismissed and the State "may not prosecute the defendant on those specific charges or on any other related charges arising out of the same incident." Md. Ann. Code, Cts. & Jud. Proc., § 12-302(c)(3)(iv) (2002).

The prophylactic rule of *Miranda* requires that, once advised of the right to counsel, police may not interrogate a suspect until counsel has been provided. 384 U.S. at 479. In *Edwards*, the Court recognized the overriding principle that any waiver of the right to counsel must, under the totality of the circumstances, be "a knowing and intelligent relinquishment or abandonment of a known right or privilege." 451 U.S. at 482 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). The Court held that "an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85 In *Bradshaw*, the Court focused on the meaning of "initiation" in the context of *Edwards*. A plurality of the Court defined initiation as something said by the accused "evinc[ing] a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46.

The rule emerging from *Edwards* and *Bradshaw* is that the police must respect a suspect's invocation of the right to counsel, but that a suspect may later initiate contact with the police and validly waive that right. In that case, the validity of the waiver is dependent on the totality of the circumstances. This Court has not, however, addressed the situation where, as here, between a suspect's invocation of the right to counsel and his initiation of further contact with the police, the police initiated contact with the suspect. The Court thus has not specified the test to be applied in that situation or the relevant facts that bear

on its application.

In this case, a number of factors should have led the Court of Appeals of Maryland to hold that Blake's initiation of contact with the police was not "tainted" by the earlier communication by the police. It is undisputed that Detective Johns properly administered *Miranda* advisements to Blake, and ceased questioning once Blake asked for an attorney. As part of permissible booking procedures, Detective Johns gave Blake a copy of the charging papers and read those charges to him, telling Blake to read the papers carefully. Blake said nothing after Officer Reese's comment and Detective Johns immediately shut down any possible conversation. Blake admitted that he first learned from reading the charging papers that Tolbert was placing all of the blame on him for the vicious murder and described himself as angry and betrayed and intent on letting the police know the truth. Thus, when Detective Johns brought Blake some clothes thirty minutes later, Blake asked whether he could still talk to the police, clearly not interpreting Reese's earlier remark as an invitation to talk to the authorities. Detective Johns asked Blake if he meant that he wanted to talk to the police, to which Blake responded that he did. Blake was then readvised of his *Miranda* rights, waived those rights, and confessed.

Absent guidance from this Court on the issue, the Court of Appeals of Maryland found that Blake's question was the result of Officer Reese's remark and that any statement Blake made subsequently without the presence of counsel was inadmissible. (App. 27a-28a). This Court

should grant certiorari to inform the lower courts, and law enforcement officers, of how properly to assess whether an improper statement by police, following a suspect's invocation of the right to counsel, is cured by actions of law enforcement officers and other intervening circumstances.

II. This Court Should Sanction a Balanced and Pragmatic Approach to Alleged *Edwards* Violations.

This past term, in *Seibert*, the Court looked at a related issue and offered a practical reading of the prophylactic protections attached to the Fifth Amendment. Consistent with its decision in *Seibert*, this Court should adopt a balanced and pragmatic approach to alleged *Edwards* violations in cases such as this one.

In *Seibert*, the plurality recognized that the Court in *Elstad* had held that "a suspect who has responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." 124 S. Ct. at 2610 n.4 (quoting *Elstad*, 470 U.S. at 318). In instances where an unwarned statement precedes a later warned statement, one looks to the circumstances of each to determine whether the second statement was "a new and distinct experience," allowing for its admissibility. *Id.* at 2611-12. According to the plurality, the circumstances in *Elstad* were easily distinguishable from the facts before it and, therefore, the later warned statement was inadmissible. *Id.* at 2611-12.

In a concurring opinion, Justice Kennedy espoused an *Elstad*-type analysis which "reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning." *Id.* at 2614-15. Because the police could have legitimate reasons not to administer *Miranda* warnings, "it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning." *Id.* at 2615. Accordingly, in *Elstad*, the Court had concluded that it would be "an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." 470 U.S. at 309.

In those cases where a two-step interrogation technique was used to deliberately undermine *Miranda*, Justice Kennedy recommended a narrower test than that of the plurality:

> The admissibility of post warning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example,

> a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

Seibert, 124 S. Ct. at 2616. The analysis offered by Justice Kennedy constitutes the holding of the Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when the Court decides a case with less than a five-Justice majority, the holding of the Court is the position taken by the member(s) who concurred on the narrowest ground).

An approach similar to that taken in *Seibert* should be applied in the context of an alleged *Edwards* violation. Application of Justice Kennedy's analysis to Blake's case would produce a far different, but entirely equitable, result, one which would provide the prophylactic protection intended by *Miranda* and yet "reflect[] a balanced and pragmatic approach to enforcement of the *Miranda* warning." 124 S. Ct. at 2614-15 (Kennedy, J., concurring).

Even recognizing the constitutional significance of the right to counsel, in the same way that a simple failure to administer *Miranda* warnings was not held to taint a voluntary and informed waiver in *Elstad*, so a simple remark by a patrol officer which elicited no response should not forever taint a subsequent voluntary and informed waiver of the right to counsel. This is especially so when curative measures have been taken to ensure that

Miranda rights, including the right to counsel, are protected and circumstances have changed sufficiently to make the subsequent waiver entirely valid.

Even assuming an impermissible remark by Officer Reese, to ascertain whether Blake initiated communications before knowingly and intelligently waiving his right to counsel, one "must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect." *Elstad*, 470 U.S. at 318. It certainly cannot be the case that Officer Reese's comment forever taints a subsequent waiver.

Until Officer Reese made his remark, the authorities had fully complied with *Miranda*. Immediately after the remark, Detective Johns took curative steps to negate Officer Reese's comment and Blake said nothing. After reading the charging papers, Blake initiated contact with Detective Johns, who reacted by first assuring himself that Blake now wanted to talk with him. Those charging papers, which included reference to the possible punishment for first degree murder and Tolbert's assigning all blame to Blake, were entirely new circumstances. Officer Reese played no role in any subsequent questioning. Detective Johns readvised Blake of his *Miranda* rights, and Blake agreed that he had initially requested counsel but had now changed his mind. These circumstances do not equate to police "badgering a defendant into waiving his previously asserted *Miranda* rights," conduct that *Edwards* was "designed to prevent." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). Rather,

Blake initiated further discussions with the police and his subsequent statements were not in violation of *Edwards*.

III. Lower Courts Are Inconsistent in Analyzing the Impact of an *Edwards* Violation.

There is inconsistency among the lower courts in analyzing the impact of an *Edwards* violation. Reflective of this inconsistency and in direct contrast to the application of *Edwards* and *Bradshaw* by the Court of Appeals of Maryland is *State v. Plch*, 826 A.2d 534 (N.H.), *cert. denied*, 124 S. Ct. 546 (2003). In *Plch*, the New Hampshire Supreme Court addressed a somewhat factually similar circumstance to that of *Blake* with a far different result.[5] After Plch informed the police that he wanted a lawyer, one of the detectives attempted to encourage Plch to continue talking with them. *Id.* at 538-39. Plch was then left alone in a room for approximately 20 minutes, after which the detective returned and informed Plch of the charges he was facing and, in response to Plch's question whether he would get a life sentence, the fact that a sentence could be a severe one. *Id.* at 539. Forty minutes later, Plch was taken to a booking room where he indicated that he wanted to talk and began making incriminating statements. *Id.* Plch was given his *Miranda* rights a second time and waived them.

---

[5] The court first addressed the claim under the state constitution but cited United States Supreme Court opinions for guidance. 826 A.2d at 539. The court then stated that the same result obtained under the federal constitution. *Id.* at 545.

Id.

The New Hampshire Supreme Court concluded that the police violated Plch's right to counsel when, after Plch invoked that right, they continued to use language intended to pressure him to change his mind. *Id.* at 540-41. This language included encouragement to Plch "to stand up and be the man you want to be and let us know where the body parts are so that family can rest." *Id.* at 538. However, according to the court, the analysis did not end there. *Id.* at 541. Rather, pursuant to *Edwards*, the court had to consider whether Plch later initiated further discussions without any improper prompting. *Id.* Stated otherwise, in order for there to be a constitutional violation, "the police must not only engage in improper prompting, that prompting must also be the cause of the defendant's initiation of further discussions with the police." *Id.* at 542. The court held that Plch's request to continue discussions, occurring one and a half hours after the officer's improper comments, was initiation on Plch's part, and not the result of earlier prompting, allowing for the admissibility of his subsequent statements. *Id.* at 542.

This application of *Edwards* and *Bradshaw* makes far more sense than that employed by the Maryland court. The New Hampshire court employed an analysis requiring a direct link between an improper remark and a subsequent waiver in order to find that waiver invalid. In other words, it allowed for circumstances to change sufficiently to allow a suspect to initiate communications, despite a prior illegality.

Although the New Hampshire court did not refer specifically to *Elstad*, its analysis recognized that a violation of *Edwards*, like a *Miranda* violation, does not forever preclude a suspect from initiating contact with the police and validly waiving the right to counsel, irrespective of the prior illegality. In lower state and federal courts, however, there is a divergence of opinion as to whether an *Elstad*-type analysis is appropriate when the police have violated a suspect's invoked right to counsel and then subsequently obtained an uncoerced statement after waiver of the right.

Some courts hold that, because *Edwards* is a prophylactic measure, an *Elstad* analysis should be applied. *See Correll v. Thompson*, 63 F.3d 1279, 1289-90 (4th Cir. 1995) (when earlier confession violates *Edwards*, *Elstad* analysis applies to later confession), *cert. denied*, 516 U.S. 1035 (1996); *Collazo v. Estelle*, 940 F.2d 411, 421 (9th Cir. 1991) (recognizing that one looks at totality of circumstances in determining whether prior *Edwards* violation necessarily negates later initiation of questioning by suspect and waiver of previously invoked right to counsel), *cert. denied*, 502 U.S. 1031 (1992); *Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988) (circumstances such as break in custody can dissolve *Edwards* claim), *cert. denied*, 489 U.S. 1059 (1989); *McFadden v. Garraghty*, 820 F.2d 654, 660 (4th Cir. 1987) (recognizing that one should employ *Elstad* type of analysis in determining whether an *Edwards* violation taints a subsequent statement by a suspect); *State v. Nash*, 718 So.2d 269, 270 (Fla. App. 1998) (*Elstad* analysis applies to violation of *Edwards* prophylactic rule); *People*

v. Bradford, 929 P.2d 544, 565-66 (Cal.) (pursuant to *Elstad*, violation of *Edwards* does not necessarily taint later waiver of right to counsel), *cert. denied*, 522 U.S. 953 (1997); *People v. Winsett*, 606 N.E.2d 1186, 1199-1201 (Ill. 1992) (police failure initially to honor invocation of right to counsel is violation of prophylactic rule, not constitutional violation, and, therefore, does not require suppression of fruits of later confession), *cert. denied*, 510 U.S. 831 (1993).

Other courts view a violation of *Edwards* as a constitutional violation which negates application of an *Elstad* analysis. *See State v. Crump*, 834 S.W.2d 265, 270 (Tenn.) (*Elstad* analysis inapplicable after suspect invokes right to counsel or right to silence), *cert. denied*, 506 U.S. 905 (1992); *State v. Hartley*, 511 A.2d 80, 90-91 (N.J. 1986) (same).

Because inconsistency in analyzing the impact of an *Edwards* violation exists in the lower courts, this Court's guidance is sorely needed. The absence of guidance has resulted in a decision by the Maryland court that is plainly wrong.

IV. Public Policy Concerns Require This Court To Reject the Maryland Court's Application of *Edwards*.

In this case, the authorities responsible for the investigation of the murder of Straughan Lee Griffin did everything in their power to protect Blake's rights. The police officers conducting the search at his house were reminded not to speak with Blake if he happened to be at

home. Detective Johns promptly ceased questioning Blake once Blake indicated he wanted an attorney. Detective Johns properly provided Blake with a copy of the charging papers and suggested that Blake read them carefully. Detective Johns took immediate action upon Officer Reese's unexpected comment to ensure that Blake's invocation of his right to counsel was fully respected.

The overwhelming conclusion, based on the totality of the circumstances, is that Blake initiated further discussions with the police. Blake changed his mind about talking to the police when he realized the seriousness of his predicament. Officer Reese's offhand remark should not result in the draconian solution found by the Court of Appeals of Maryland. "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan v. Tucker*, 417 U.S. 433, 446 (1974). To repeat Justice Scalia's prescient statement in *Minnick*: "The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free." 498 U.S. at 166 (Scalia, J., dissenting).

Likewise in the instant case, the State should not be deprived of critical evidence, or the right to proceed to trial, because of the brief remark of a patrol officer who walked back to the cell when Detective Johns was bringing Blake the charging document, which remark was immediately dismissed by the detective in Blake's

presence. To hold as the Court of Appeals of Maryland did does not advance the raison d'etre for *Edwards, i.e.,* preventing government officials from "badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick*, 498 U.S. at 151.

In sum, in spite of Officer Reese's remark, the totality of the circumstances in this case indicate that Blake understood that the police would not talk to him after he invoked his *Miranda* rights, initiated contact with the police after reading the charging papers, and then voluntarily and knowingly waived his *Miranda* rights.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. LISIC
Assistant Attorneys General

Counsel for Petitioner

**Counsel of Record*
September 13, 2004

APPENDIX

APPENDIX

CONTENTS OF APPENDIX

Page

APPENDIX A:

Reported opinion of the Court of Appeals of Maryland, *Leeander Jerome Blake v. State of Maryland*, filed May 12, 2004, reconsideration denied June 16, 2004, 381 Md. 218, 849 A.2d 410 (2004) ..... 1a -29a

APPENDIX B:

Unreported opinion of the Court of Special Appeals of Maryland, *State of Maryland v. Leeander Blake*, filed October 29, 2003, No. 771, September Term, 2003 ..... 30a -58a

APPENDIX C:

Transcript of proceedings in the Circuit Court for Anne Arundel County, Maryland, Motions Hearing dated June 3, 2003, Criminal Nos. K-2002-2154 and K-2002-2417 ..... 59a -87a

APPENDIX A

Court of Appeals of Maryland.

Leeander Jerome BLAKE
v.
STATE of Maryland.

No. 81, Sept. Term, 2003.

May 12, 2004.
Reconsideration Denied June 16, 2004.

Background: State appealed from order of the Circuit Court, Anne Arundel County, North, J., granting defendant's suppression motion. The Court of Special Appeals reversed, and defendant petitioned for writ of certiorari.

Holding: The Court of Appeals, Raker, J., held that officer's remark to defendant stating "I bet you want to talk now, huh" after defendant unequivocally invoked his right to counsel under *Miranda* and detective gave defendant charging document listing the penalty to which defendant was subjected as "death" amounted to the functional equivalent of interrogation.

Reversed and remanded with instructions.

Argued before BELL, C.J., RAKER, WILNER, CATHELL, HARRELL, BATTAGLIA, JOHN C. ELDRIDGE (Retired, specially assigned), JJ.

This case is an interlocutory appeal filed by the State[6] from an Order in the Circuit Court for Anne Arundel County granting Leeander Jerome Blake's motion to suppress his incriminating statements on the grounds that the police elicited his statements in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Court of Special Appeals disagreed with the Circuit Court, and in an unreported opinion, reversed. This Court granted Blake's petition for writ of certiorari to consider the single question of whether the police actions in question constituted the functional equivalent of interrogation following petitioner's invocation of his *Miranda* rights, thereby violating petitioner's right against compelled self-incrimination. *Blake v. State,* 378 Md. 176, 835 A.2d 1103 (2003). We shall hold that the police actions

---

[6] Pursuant to Maryland Code (1973, 2002 Repl.Vol., 2003 Cum.Supp.) § 12-302(c)(3)(i) of the Courts and Judicial Proceedings Article, the State may appeal in the following circumstances:

> "In a case involving a crime of violence as defined in § 14-101 of the Criminal Law Article, and in cases under §§ 5-602 through 5-609 and §§ 5-612 through 5-614 of the Criminal Law Article, the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Constitution of Maryland, or the Maryland Declaration of Rights."

constituted the functional equivalent of interrogation, thereby violating petitioner's rights, and, under the circumstances presented herein, the trial court properly suppressed petitioner's statements.

I.

Petitioner was indicted by the Grand Jury for Anne Arundel County for the offenses of first degree murder, second degree murder, and manslaughter, in violation of former Maryland Code (1957, 1996 Repl.Vol., 2001 Cum.Supp.), Article 27 § 407, § 411, and § 387.[7] Straughan Lee Griffin, a resident of Annapolis, was shot and killed in front of his home on September 19, 2002. His assailant[s] shot him in the head, stole his automobile, and ran over his body as they fled from the scene.

Petitioner filed an omnibus pre-trial motion to suppress all evidence seized by the State. We focus here on his motion to suppress his incriminating statements. The Circuit Court held an evidentiary hearing and granted the motion to suppress. We set forth the facts as developed at the suppression hearing.

---

[7] Article 27 of Maryland Code (1957, 1996 Repl.Vol., 2001 Cum.Supp.), which was in effect when the events here occurred, has since been repealed and recodified. The provisions relating to first degree murder, second degree murder, and manslaughter are now found in Maryland Code (2002, 2003 Cum.Supp.) § 2-201, § 2-204, and § 2-207 of the Criminal Law Article.

On October 25, 2002, Terrence Tolbert was arrested in connection with the murder of Straughan Lee Griffin. Tolbert implicated petitioner in the crime. Between 4:30 and 5:00 a.m. on the following day, the Anne Arundel County police arrested petitioner at his home. Petitioner was wearing boxer shorts and a tank top and no shoes. He was handcuffed and transported by uniformed officers to the Annapolis Police Department.

The police took petitioner to a room identified as an "intake room" or "booking room." Detective William Johns, the lead detective, advised petitioner of his rights pursuant to *Miranda v. Arizona.* Petitioner invoked his right to counsel, indicating he did not wish to speak with the police officers without an attorney, and after signing the police advice of rights form, he then was placed in a holding cell at approximately 5:25 a.m.

At 6:00 a.m., Detective Johns, accompanied by uniformed Officer Curtis Reese, went to petitioner's cell and gave him a copy of the arrest warrant and statement of charges.[8] Detective Johns explained the charges to

---

[8] Md. Rule 4-212(e) requires that a defendant be served with a copy of the statement of charges. The Rule provides, in pertinent part:

> "[A] warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest."

petitioner and told him that they were serious charges, and that he needed to read the document carefully and make sure he understood it.

The statement of charges that Detective Johns gave to petitioner was a District Court of Maryland computer print-out listing the charges. The statement of charges indicated that petitioner was charged with first degree murder, second degree murder, armed robbery, armed carjacking, and use of a handgun in a crime of violence. The penalty stated on the document for the offense of first degree murder was, in all capital letters, "DEATH." Petitioner's date of birth, reflected on the statement of charges, was June 1, 1985; he was seventeen years of age. As a person under the age of eighteen years at the time of the offense, petitioner was not eligible for the death penalty. *See* Md.Code (2002, 2003 Cum.Supp.) § 2-202(b)(2)(i) (to be death eligible in Maryland, a person must be eighteen years of age or older).

Detective Johns testified that after he handed petitioner the charging document and turned to leave, Officer Reese, apparently having followed Detective Johns to the cell block area, appeared and said, in a tone Detective Johns characterized as loud and confrontational, "I bet you want to talk now, huh!" Detective Johns said that he was surprised by Officer Reese's statement, that it was unexpected, and that Detective Johns said, very loudly

within petitioner's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Detective Johns testified that he was concerned that "Officer Reese's outburst would violate Mr. Blake's request for counsel prior to being questioned" and, as a result, he told Officer Reese that petitioner had asked for an attorney and they could not reinitiate any kind of conversation with him.

Petitioner remained in the cell block, wearing only his boxer shorts and t-shirt. Approximately one-half hour after the earlier contact, Detective Johns went back to petitioner's cell to give petitioner his clothing which had been brought to the station by another police officer. Detective Johns opened the exterior door, walked in front of petitioner's cell, and handed him the clothing. Petitioner then said, "I can still talk to you?" Detective Johns responded: "Are you saying that you want to talk to me now?" Petitioner responded "yes." Detective Johns left the cell area and returned after a few minutes. He told petitioner that he would have to read him his rights again and that he would be back in a few minutes. Petitioner then was taken back to the intake room, was re-advised of his *Miranda* rights, which he waived, and agreed to provide a statement in the absence of an attorney.

Petitioner made certain incriminating statements to Detective Johns as he explained his involvement in the events of September 19, 2002. Detective Johns asked him if he would be willing to take a polygraph exam and petitioner agreed. He was transported to Maryland State Police Barracks J in Annapolis, where Corporal Lloyd E.

White again advised petitioner of his *Miranda* rights. After the test was administered, petitioner made further statements.

Petitioner testified at the hearing on the motion to suppress. He testified that he was at home watching television in the early morning hours of October 26, 2002, when he was arrested at approximately 4:30 a.m. Wearing only a tank top, boxer shorts, and no shoes, he was handcuffed and taken outside, where it was cold and wet, and transported to the police station. He was placed in a room and was told by an officer that Terrence Tolbert had identified him as the shooter of Mr. Griffin. He said he wanted a lawyer and was placed in a cell. He said that when Detective Johns and Officer Reese gave him a copy of his charges and Officer Reese made the statement to him, he had just seen that he was facing the death penalty and he was scared. The two officers left, Detective Johns brought him his clothing and then left, and then Detective Johns returned. Petitioner's description of what ensued next differed from that of Detective Johns.[9] Petitioner's version is that the detective initiated the conversation again, stating: "Mr. Blake, do you wish to still talk to me?" In response, petitioner said, "May I still talk to you?" The detective allegedly responded, "Yes." Petitioner denied first asking Detective Johns if he could talk to him.

---

[9] The hearing judge accepted Detective Johns's version of events regarding who spoke first after Detective Johns returned.

In response to a question asking petitioner what caused him to speak to Detective Johns after he had invoked his *Miranda* rights, petitioner stated:

> "First, it was what Officer Reese said to me, 'I bet you want to talk now, huh!' I was scared, cold. Never went through nothing like this. And I saw my charges and I saw I was facing death."

The Circuit Court granted petitioner's motion to suppress his statements. Judge Pamela North began by noting that petitioner had invoked his right to counsel and that pursuant to *Miranda,* no further interrogation could ensue. Judge North found the following:

> "The Defendant was still in underwear with no shoes on. During this time, the Defendant made no statements and asked no questions. There was, as of this point, no indication the Defendant would change his mind.
>
> At approximately 6:00 a.m., Detective Johns and Officer Reese, and Officer Reese, by the way, was the same officer who had previously transported the Defendant to the Annapolis Police Department. They both walked back to his cell. As in *Edwards,* Defendant did not request or suggest that the officers should come back to his cell. Defendant was awake. Johns took the statement of charges back to the Defendant, handed them to him, and read the charges to him. Johns testified, and this is a quote, "I said to him, they are serious charges. He needs to read it carefully and make sure he understood it."

> As Johns turned to walk out, Reese said, in a confrontational loud voice, "I bet you want to talk now, huh!" Johns testified he was surprised by this.
>
> * * *
>
> [Detective Johns] also erroneously served him with a document which stated that the penalty for count one murder was death. The word death being written in all capital letters. Defendant was, in fact, not eligible for the death penalty. This was either done intentionally or by mistake.... No matter who was responsible for death being typed in capital letters on the penalty section for murder, it was still State action.
>
> So the next question is was there interrogation? Was there a statement made by the police which the police knew or should have known would be reasonably likely to elicit an incriminating response? That answer has to be yes.
>
> * * *
>
> I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement.
>
> * * *
>
> So the question is how do we know what Reese intended. Well, let's analyze the remark he made.

Defendant is handed a statement of charges indicating to him, a seventeen-year-old, indicating to him for the first time that he is being charged with murder and he can get the death penalty.

Reese's statement was, "I bet you want to talk now, huh!" This is not a vague appeal to Defendant's conscience like the remarks were in *Brewer versus Williams*. First, the statement, itself, suggests he should want to talk. And the word, "now," that is, "I bet you want to talk now" clearly refers Defendant to what has just been handed to him. In other words, look at those charges, look at that penalty, and I'll bet you will want to talk.

* * *

It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is in direct response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement. So, until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them. Since twenty-eight minutes had passed, he asked, "I can still talk to you?" Even though that period of time had passed.

Is there any possible interpretation of that statement that it is, as the State has urged the Court to find, simply an innocent offhanded comment not meant or expected to elicit an incriminating response? I don't think so. Examples of innocent offhanded comments not likely to elicit an incriminating response would be, quote, "Here are

some clothing for you." Or, "Please move away from the door so I can unlock it." Or, "Do you need a drink of water?"

United States v. Walker instructs courts to look at the context in which the statement is made. Once again, the context is the statement was made to a seventeen-year-old with no *Miranda* or interrogation experience, who was still in a chilly cell in his underwear with no shoes on, without a parent present or available, just as he is being handed papers advising him he is charged with murder and can get death.... That statement, under these circumstances, was enough to make an adult repeat offender squirm, not alone a seventeen-year-old.

* * *

Here, Defendant is still in custody, still at the Annapolis police department. Only twenty-eight minutes has gone by since the illegal interrogation. Enough time for him to read the charging document and only one hour and seventeen minutes since he invoked his right to counsel.

He is still seventeen years old. Still undressed. Still in a cold cell, where he is facing death. And an officer had made a case for him to speak now through that officer's coercive statement.

He has no parent present. The Defendant testified that he was scared and cold and thought he was facing death.

* * *

Once Defendant made certain incriminating statements, he was then asked by Detective Johns if he wanted to take a polygraph. This is all one continuous stream of events. There was no break in time or place here. No attenuation.

* * *

The polygraph process began at about 8:30 or 9:00 o'clock with Defendant's mother present at the Maryland State Police Barracks. She signed a consent form but never saw or spoke to the Defendant. We now have a change of location and the re-Mirandaizing of the Defendant.

However, this is all one continuous course of conduct beginning with Officer Reese's statement and other coercive circumstances. Defendant had, as some cases talk about, already let the cat out of the bag. It is unlikely that an honest seventeen-year-old who is respectful of authority would realize he could turn back now.

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to counsel.

He was thereafter interrogated by police in violation of *Miranda* and *Edwards*. The State must prove his subsequent *pro forma* waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden."

The trial court held that Officer Reese's statement was interrogation and that it violated *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The court granted Blake's motion to suppress as to any and all statements he made at the Annapolis police department and at the Maryland State Police Barracks.

The State noted a timely appeal to the Court of Special Appeals. A divided intermediate appellate court, in an unreported opinion, Bloom, J., dissenting, reversed the judgment. We granted petitioner's writ of certiorari to answer the following question: "Did the police actions in question constitute the functional equivalent of interrogation?" 378 Md. 176, 835 A.2d 1103.

II.

There is no dispute in this case that petitioner was in custody and had invoked his right to counsel. The first question is whether the statement of Officer Reese constituted "police-initiated custodial interrogation" in contravention of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Petitioner argues that Officer Reese's comment, made in conjunction with Detective Johns's passing to petitioner a copy of the statement of charges which incorrectly informed him he was facing the death penalty, was the functional equivalent of interrogation. He maintains that the comment was made specifically for the purpose of

getting petitioner to talk and the officer knew or should have known that, under the circumstances, the comment was likely to elicit an incriminating response. Petitioner argues that his subsequent statements were suppressed properly because they were a product of the unlawful police-initiated interrogation which violated *Edwards*.

The State's argument is that Officer Reese's remark to petitioner was not interrogation--that petitioner initiated contact with the police after he read the charging documents and then voluntarily waived his *Miranda* rights before making incriminating statements. The State contends that Officer Reese's remark was not the functional equivalent of interrogation--that it was nothing more than a comment on the seriousness of the charges and, in a sense, a rhetorical question. Even if Officer Reese's remark is viewed as interrogatory or as an invitation to talk, the State maintains that Detective Johns removed any alleged taint from the remark when he admonished Officer Reese immediately that they could not talk to petitioner because he had invoked his right to counsel.

III.

Our review of the trial court's ruling on a motion to suppress evidence is limited to the record developed at the suppression hearing. *See White v. State,* 374 Md. 232, 249, 821 A.2d 459, 469 (2003). We accept the facts as found by the motions judge unless they are clearly erroneous. *Id.* The evidence is to be viewed in the light most favorable to the prevailing party. *See State v. Rucker,* 374 Md. 199, 207, 821 A.2d 439, 444 (2003). We "undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case." *See White,* 374 Md. at 249, 821 A.2d at 469.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), dictates that when a suspect is taken into custody, the person is entitled to certain procedural safeguards before law enforcement officers may interrogate that person. Those rights include the right to consult with an attorney. *Id.* at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706-07. Once a suspect asks to speak with an attorney, that person may not be interrogated further until either counsel has been made available or until the suspect validly waives the earlier request for an attorney. *Id.* at 444-45, 86 S.Ct. at 1612, 16 L.Ed.2d at 707. *See Edwards,* 451 U.S. at 484-85, 101 S.Ct. at 1885, 68 L.Ed.2d at 386; *Radovsky v. State,* 296 Md. 386, 392-93, 464 A.2d 239, 242-43 (1983) (noting *per se* rule precluding police-initiated interrogation after an arrestee has expressed a desire for the assistance of counsel); *Bryant v. State,* 49 Md.App. 272, 279, 431 A.2d 714, 718 (1981) (stating that "even at the expense of redundancy ... *Miranda* and *Edwards* mean exactly what they say: once the accused requests the presence of counsel at a custodial interrogation, the Fifth Amendment to the Constitution of the United States of America and Article 22 of the Maryland Declaration of Rights are *ipso facto* invoked, and *all questioning must cease*").

Under the rule developed in *Edwards,* "an accused ...

having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-85, 101 S.Ct. at 1885, 68 L.Ed.2d at 386. The Supreme Court held that once a suspect has invoked his right to counsel, the police may not make a subsequent attempt to elicit a waiver and then a statement by re-advising him of his *Miranda* rights. A constitutionally valid statement may be obtained by the police in two ways: if the suspect initiates further conversation with the police or if an attorney has been made available to the suspect. *See Smith v. Illinois,* 469 U.S. 91, 94-95, 105 S.Ct. 490, 492-93, 83 L.Ed.2d 488, 493-94 (1984). Following a suspect's request for counsel, a valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated interrogation. *Edwards,* 451 U.S. at 484, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386. *See Radovsky,* 296 Md. at 398-99, 464 A.2d at 246 (holding that after Radovsky had invoked his right to counsel, the police improperly initiated custodial interrogation in violation of *Edwards*). The burden is on the State to prove that, after invoking his or her right to counsel, the accused initiated further discussion with the police. *See State v. Munson,* 594 N.W.2d 128, 141 (Minn.1999) (holding that "the state has the burden of proving that, after invoking his right to counsel, [defendant] initiated further discussion with the police"). If we find that petitioner did not initiate further discussions with the police, following *Edwards,* we do not consider whether he subsequently waived his right to

counsel.[10] *See Oregon v. Bradshaw,* 462 U.S. 1039, 1046, 103 S.Ct. 2830, 2835, 77 L.Ed.2d 405, 413 (1983) (stating that "[s]ince there was no violation of the *Edwards* rule in this case, the next inquiry was 'whether a valid waiver of

---

[10] Some courts have held that a defendant's statements are inadmissible once the police have initiated contact with the defendant in violation of *Edwards,* rendering it unnecessary to inquire whether the defendant validly waived his or her *Miranda* rights. *See, e.g., State v. Munson,* 594 N.W.2d 128, 140 (Minn.1999) (holding that, where officers resumed interrogation before the suspect initiated further conversation, suspect's statements must be excluded and the court need not reach the question of whether suspect's subsequent waiver was voluntary). The Supreme Court has suggested the same. In *Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the Court stated, "*[s]ince there was no violation of the* Edwards *rule in this case,* the next inquiry was 'whether a valid waiver of the right to counsel and the right to silence had occurred." *Id.* at 1046, 103 S.Ct. at 2835, 77 L.Ed.2d at 413 (emphasis added). Implicit in this statement is the notion that courts do not engage in a waiver inquiry when it is the police, rather than the suspect, who "initiate" contact. *See also Michigan v. Jackson,* 475 U.S. 625, 636, 106 S.Ct. 1404, 1411, 89 L.Ed.2d 631, 642 (1986) (applying *Edwards* rule to a claimed violation of defendant's Sixth Amendment right to counsel and holding that "if police initiate interrogation after a defendant's assertion ... of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid").

the right to counsel and the right to silence had occurred"); *Radovsky,* 296 Md. at 392, 464 A.2d at 242 (holding that "the defendant's right to have counsel during interrogation was violated, under the principles of *Edwards* and *Miranda,* and thus all evidence obtained from Radovsky subsequent to his request for counsel should have been suppressed").

Interrogation means more than direct, explicit questioning and includes the functional equivalent of interrogation. *See Drury v. State,* 368 Md. 331, 793 A.2d 567 (2002). The Supreme Court, in *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), set out the test for establishing when a suspect, who is in custody and has invoked the right to counsel but does not yet have the assistance of counsel, has been subjected to "interrogation." The Court stated:

> "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its *functional equivalent.* That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Id. at 300-01, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 307-08 (emphasis added) (footnotes omitted).

Although the test of whether the police should know

their words or actions are reasonably likely to elicit an incriminating response is an objective one, the intent of the police is not irrelevant. *Id.* at 301-02 n. 7, 100 S.Ct. at 1690 n. 7, 64 L.Ed.2d at 308 n. 7. If a police officer acts with a purpose of getting a suspect to talk, it follows that the officer has reason to know that his or her conduct was reasonably likely to elicit an incriminating response. *Id.* at 302 n. 7, 100 S.Ct. at 1690 n. 7, 64 L.Ed.2d at 308 n. 7. We focus on the defendant's perspective rather than on the police officer's intent. *See Arizona v. Mauro,* 481 U.S. 520, 528, 107 S.Ct. 1931, 1936, 95 L.Ed.2d 458, 467 (1987).

"Interrogation," as used in *Miranda,* has been further explicated in *Innis,* as follows:

> "[T]he term 'interrogation' ... refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the

unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."

Innis, 446 U.S. at 301-02, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 308 (citations omitted).

The State maintains that petitioner's rights under *Miranda* and *Edwards* were not violated because the police were presenting petitioner merely with the charging document, a duty they were mandated to perform under Maryland law. The State characterizes Officer Reese's comment as nothing more than a comment on the seriousness of the charges and as a rhetorical question, concluding that his comment does not constitute interrogation. The answer to this argument depends upon the answer to the question as to whether, under *Innis,* the police officers engaged in activities which they should have known were reasonably likely to elicit an incriminating response. No one disputes here that once petitioner invoked his *Miranda* rights, there was no express questioning.

The Circuit Court found that the comment of Officer Reese amounted to the functional equivalent of interrogation. We agree.

Petitioner clearly and unequivocally invoked his right to counsel under *Miranda.* Thereafter, within a very short period of time, Detective Johns gave petitioner the

charging document listing the penalty to which petitioner was subjected as "DEATH." Officer Reese initiated communication with petitioner when he said to him, "I bet you want to talk now, huh!" Whether the remark made by Officer Reese was the functional equivalent of interrogation depends in part on whether the officer's comment was directed towards petitioner and was reasonably likely to elicit a response.

It is undisputed that Officer Reese's comment was directed towards petitioner. The remaining question is whether the comment was reasonably likely to elicit a response. Officer Reese made his comment to petitioner when Detective Johns gave petitioner the charging document advising him that he was subject to the death penalty; any reasonable officer had to know that his comment was reasonably likely to elicit an incriminating response. When the charging document was given to petitioner, containing a false statement of the law with respect to the penalty of death, it was accompanied by an officer's statement which served no legitimate purpose other than to encourage petitioner to speak. Detective Johns's reaction supports this conclusion. *See United States v. Cooper,* 19 F.3d 1154, 1162 (7th Cir.1994) (stating that "[w]here an objective observer would believe that the encounter was reasonably likely to elicit an incriminating response from the defendant, the court will find that the encounter constituted the 'functional equivalent' of interrogation," citing *Innis,* 446 U.S. at 301, 100 S.Ct. at 1689, 64 L.Ed.2d at 308).

We reject the State's characterization offered at oral

argument that the officer's statement was merely a rhetorical question. The officer's statement to petitioner could only be interpreted as designed to induce petitioner to talk and it was improper. This statement was the functional equivalent of interrogation, and it was custodial interrogation. Actions taken by the police that the police should know are reasonably likely to elicit an incriminating response from a suspect amount to the functional equivalent of interrogation.

Merely presenting an accused with a charging document, without more, is not the functional equivalent of interrogation. In Maryland, when a defendant is arrested without a warrant, a copy of the charging document must be served on the defendant promptly after it is filed. Md. Rule 4-212(f). *See White,* 374 Md. at 250-51, 821 A.2d at 469-70; *State v. Conover,* 312 Md. 33, 42, 537 A.2d 1167, 1171 (1988). In the instant case, the officers' conduct does not fall into the category of fulfilling a legal duty and merely serving a charging document upon a defendant. Instead, we have an interrogatory type statement by an officer concomitant with the serving of a document containing the most egregious misstatement as to the penalty for the offense.

The State argues that even if Officer Reese's statement was interrogation, the detective told petitioner that they could not talk to him, and it was petitioner who reinitiated interrogation, and then knowingly and intelligently waived his *Miranda* rights. The State maintains that if the suspect reinitiates contact with the police, and then waives his rights, police questioning may then commence.

Relying on *Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the State argues that petitioner's question, "Can I still talk to you?", is strong evidence that petitioner initiated the further contact with the police. The State points out that Blake reinitiated contact with the police only after reading the charges, the evidence to support those charges, and specifically, after reading what Terrence Tolbert had to say.

The law is clear that a suspect may validly waive *Miranda* rights, but once the right to counsel has been invoked, additional safeguards are necessary. The Supreme Court pointed out in *Edwards* as follows:

> "[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that *an accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.*"

451 U.S. at 484-85, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386 (emphasis added) (footnote omitted). In *Bradshaw,* the Court found that the accused in fact initiated the conversation and that there was no violation of the *Edwards* rule. 462 U.S. at 1045-46, 103 S.Ct. at 2835, 77

L.Ed.2d at 412- 13. In assessing whether the accused initiated the interrogation, the Court observed that the accused's question, "Well, what is going to happen to me now?", although ambiguous, was, "in the ordinary dictionary sense of that word," initiation. *Id.* at 1045, 103 S.Ct. at 2835, 77 L.Ed.2d at 412. Nonetheless, the Court stated:

> "While we doubt that it would be desirable to build a superstructure of legal refinements around the word 'initiate' in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*.

Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood it is apparent from

> the fact that he immediately reminded the accused that "[y]ou do not have to talk to me," and only after the accused told him that he "understood' did they have a generalized conversation. On these facts we believe that there was not a violation of the *Edwards* rule."

Id. at 1045-46, 103 S.Ct. at 2835, 77 L.Ed.2d at 412-13 (citation omitted). One court concluded that "initiation" by a defendant "occurs when the defendant evinces 'a willingness and a desire for a generalized discussion about the investigation.' " *Holman v. Kemna,* 212 F.3d 413, 417 (8th Cir.2000) (quoting *Bradshaw,* 462 U.S. at 1045-46, 103 S.Ct. at 2835, 77 L.Ed.2d at 412).

In finding that petitioner's question was "in direct response to" Officer Reese's coercive statement, Judge North found that the police reinitiated the contact. The court also found that petitioner "initiated a conversation with [Detective] Johns after he [was] interrogated without counsel twenty-eight minutes earlier." Whether the ultimate issue of "initiation" under *Edwards* is a factual issue requiring a deferential standard of review, *see United States v. Gomez,* 927 F.2d 1530, 1539 n. 9 (11th Cir.1991) (stating that the finding of "initiation" under *Edwards* is considered a factual issue, citing *Fike v. James,* 833 F.2d 1503 (11th Cir.1987)), or a question of law requiring *de novo* review, *see Holman,* 212 F.3d at 417 (holding that issue is legal one requiring *de novo* review, citing *Bannister v. Delo,* 100 F.3d 610, 620 n. 9 (8th Cir.1996); *United States v. Whaley* 13 F.3d 963, 968 (6th Cir.1994)), under either standard of review, we agree with the conclusion of the Circuit Court.

We agree with Judge North that petitioner did not initiate further contact with the police and that the police violated the *Edwards* rule. Although petitioner's question to Detective Johns, "I can still talk to you?" might be considered an "initiation" of contact with the officers in the "dictionary sense" of the word as used in *Bradshaw,* it could hardly be said that, under the circumstances, petitioner initiated the contact as that term is contemplated in the legal sense. Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected. There was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation. *See Dunkins v. Thigpen,* 854 F.2d 394, 397 (11th Cir.1988) (holding that break in custody after invocation of Fifth Amendment rights ends the need for the *Edwards* rule); *United States v. Walker,* 624 F.Supp. 103, 105 (D.Md.1985) (holding that following defendant's invocation of his *Miranda* rights, delay of approximately one hour not sufficient to constitute waiver of right to have counsel present before he made any statement).

We reject the State's argument that, even if Officer Reese interrogated petitioner in violation of *Miranda* and *Edwards,* Detective Johns somehow cured the violation by declaring in a loud voice: "No, he doesn't want to talk to

us. He already asked for a lawyer. We cannot talk to him now." Judge North's conclusion that Detective Johns's remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous. The delay of twenty-eight minutes before petitioner asked if he could talk to the officers is insufficient to constitute a waiver of his right to have counsel present before he made any statement. The break in time from Officer Reese's improper interrogation to petitioner's inquiry was very short, indicating that the latter was a continuation of the former.

The record supports the Circuit Court's finding that petitioner's question was in direct response to Officer Reese's unlawful interrogation and was the product of impermissive interrogation. Under these circumstances, we conclude that petitioner did not "initiate" conversation with the police.

The United States Court of Appeals for the Eleventh Circuit, in *United States v. Gomez,* 927 F.2d 1530 (11th Cir.1991), addressed a similar issue. After Gomez had indicated that he wished to speak with his attorney, DEA agents stated that Gomez should consider cooperating with the government because he faced a possible life sentence and a minimum sentence of ten years. When Gomez asked an agent what he was charged with, he received incorrect information that he was charged with possession of ten kilograms of cocaine. Gomez then expressed his desire to cooperate, was re-advised of his *Miranda* rights, and made incriminating statements. The court held that the agents' comments about the possible benefits of cooperating

constituted further interrogation. *Id.* at 1538. The court further noted that, once the police violate *Edwards,* it does not make sense to say that an accused can thereafter "initiate" conversation with the police unless a substantial amount of time has elapsed such that "the coercive effect of the interrogation will have subsided." *Id.* at 1539 n. 8. Although the accused technically may begin a conversation with the police, if this occurs after the police have interrogated the accused in violation of *Edwards,* the voluntariness of such "initiation" is suspect and statements subsequently obtained are inadmissible. *Id.* at 1539. The court noted that "*Edwards* would be rendered meaningless if agents were permitted to continue interrogation after the request for counsel, and then claim that the consequent response by the accused represented initiation and permitted a waiver of the asserted counsel right." *Id.*

We hold that all statements made by petitioner after he invoked his *Miranda* rights are inadmissible and the motion to suppress the statements was properly granted.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AND TO REMAND CASE TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH MARYLAND CODE (1973, 2002 REPL. VOL., 2003 CUM. SUPP.) § 12-302(c)(3)(iv) OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY ANNE

ARUNDEL COUNTY.

APPENDIX B

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 771

September Term, 2003

STATE OF MARYLAND

V.

LEEANDER BLAKE

Eyler, James R.,
Bloom, Theodore G.
(Ret., specially assigned),
Karwacki, Robert L.
(Ret., specially assigned),

JJ.

Opinion by Eyler, James R., J.,
Dissenting opinion by Bloom, J.

Filed: October 29, 2003

The State appeals from an order entered by the Circuit Court for Anne Arundel County granting a motion to suppress incriminating statements by Leeander Jerome Blake, appellee, on the ground that the statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966).[1] We conclude that the circuit court erred and, consequently, shall reverse its ruling.

As a preview, the core facts are (1) appellee, while in custody (2) was advised of his Miranda rights, (3) appellee did not waive those rights and requested counsel, (4) police officers gave appellee a statement of charges, (5) at or about the same time, a police officer made a comment to appellee, (6) approximately 30 minutes later, appellee expressed a willingness to talk to police, (7) appellee was again advised of his Miranda rights, (8) appellee provided incriminating information, (9) appellee agreed to take a lie detector test, (10) appellee was again advised of his Miranda rights, and (11) appellee provided additional incriminating information.

Accepting the hearing court's first level findings of fact, and looking at the facts most favorable to appellee, we

---

[1] Miranda requires that a person in custody be advised of the right to remain silent, the right to the presence of an attorney, retained or appointed, and that any statement made may be used as evidence. 384 U.S. at 444. If the warnings are not given, a statement that is the direct product of the violation is not admissible in evidence, even if voluntary in a due process sense. Michigan v. Tucker, 417 U.S. 433, 443 (1974).

shall assume that the contact which resulted in the incriminating statements was, at least in part, in response to the comment by the police officer. The precise question before us, therefore, is whether the comment constituted "interrogation" within the meaning of Miranda and Edwards v. Arizona, 451 U.S. 477 (1981). We answer that question in the negative.

Evidence at Suppression Hearing

On September 19, 2002, Straughan Lee Griffin, a resident of Annapolis, was shot and killed. On October 25, 2002, Terrence Tolbert was arrested and charged in connection with the homicide. On October 26, 2002 at approximately 5:00 a.m., at his home, appellee was arrested and charged in connection with the homicide. Following his arrest, appellee made incriminating statements to the police regarding his participation in the crime.

Appellee moved to suppress the statements on (1) traditional due process and State law grounds and (2) a violation of Miranda and Edwards. On May 9 and 16, 2003, the circuit court held a hearing on appellee's motion to suppress his statements.

At the hearing, the State called Detective William Johns, a detective with the Annapolis Police Department, and the lead investigator. He testified to the following. After appellee was arrested, he was transported to the Annapolis Police Department and Detective Johns, in the presence of Corporal Thomas Hannon, advised appellee of

his rights, pursuant to Miranda. Appellee initialed each section of the advice of rights form as it was explained to him. Appellee invoked his right to counsel, and at approximately 5:25 a.m., appellee was placed in a holding cell.

At 6:00 a.m., Detective Johns, accompanied by Officer Curtis Reese, went to appellee's cell and gave him a copy of the statement of charges and the application for statement of charges. Detective Johns explained the charges, told appellee to read the documents carefully, and turned to walk out. When Detective Johns turned to leave, Officer Reese said something to the effect, "I bet you want to talk now, huh?" Detective Johns stated that not enough time had elapsed for appellee to have read the charges when Officer Reese made the statement. Detective Johns, surprised by the comment, said loudly, so appellee would hear, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now" and walked Officer Reese out of the cell block. Detective Johns then reported what had occurred to his supervisor, Sergeant Greg Kirchner.

When appellee was arrested, he was wearing a T-shirt and boxer type shorts. It was a "little chilly" or "cold" in the cell. Detective Johns knew that someone was bringing clothes for appellee from appellee's house, but he did not know who. At approximately 6:30 a.m., after the clothes had arrived, Detective Johns took the clothes to appellee. As Detective Johns turned to walk out of the cell block, appellee asked if he could talk to him. Detective Johns left the cell area and reported to Sergeant Kirchner and

Corporal Hannon.

At approximately 6:40 a.m., Detective Johns took appellee to an intake room. Once they arrived, Detective Johns asked appellee if he had initially stated that he wished to exercise his rights and had changed his mind. Appellee answered in the affirmative. Detective Johns again reviewed the Miranda warnings, and appellee initialed the advice of rights form. Appellee stated that he wished to speak and gave a statement during which Detective Johns learned that appellee was 17 years old, was in the 11th grade in school, was sober, not on medications, and had two previous contacts with the police department. The contacts were on July 29, 2001 and January 30, 2002. Detective Johns testified that appellee was calm and cooperative during the interview, which took approximately one hour. Appellee was not handcuffed, no weapons were present, and no threats or promises were made to appellee. The parties stipulated at the suppression hearing that appellee's statement contained incriminating information.

After the statement, Detective Johns asked appellee if he was willing to take a polygraph test, and appellee agreed. Detective Johns contacted Corporal Lloyd E. White, Jr., with the Maryland State Police, to conduct the test. Appellee's mother was also notified, and she consented to the test. The test was conducted at the State Police Barracks in Annapolis. Corporal White gave appellee the Miranda warnings again before conducting the test. The parties stipulated that appellee made incriminating statements during the polygraph examination

and thereafter.

Corporal White, called by the State, testified to the following. On October 26, 2002 he met with Detective Johns, appellee, and appellee's mother. Appellee's mother consented to the polygraph test. Corporal White advised appellee of his Miranda rights and then administered a polygraph test. He stated that no threats or promises were made to appellee, and appellee was "very eager" to speak. Corporal White testified that he did not believe certain statements by appellee, and he asked appellee if he could offer any explanation for his disbelief. At that point, appellee provided additional incriminating information about the crime. The process began between 9:15 and 9:25 a.m. and took approximately two and one-half hours.

Mary Ann Costello, a State's witness, testified to the following. At the time of the hearing, she was a juvenile counselor employed by the Department of Juvenile Justice. She was appellee's probation officer from March 1, 2002 until his case was "rescinded" on August 23, 2002. Ms. Costello described appellee as intelligent and polite and stated that he had complied with his probation requirements. Ms. Costello also stated that appellee had a part-time job and was going to school and that he had had other part-time jobs in the past.

Appellee called Officer Reese, who testified to the following. After appellee was arrested, Officer Reese transported him from appellee's home to the police station. At approximately 6:00 a.m., Officer Reese entered appellee's cell block, pursuant to a policy of routinely

checking on prisoners. Appellee stated that he wanted to talk to someone. Detective Johns, who was not at the cell with Officer Reese but was in the area, shouted that appellee had requested an attorney, and Officer Reese left. Officer Reese denied saying anything to appellee.

Appellee's mother, Lawanda Pierce, testified on his behalf and described the details of his arrest.

Appellee testified that, at approximately 4:00 a.m., he was watching cartoons on television when the police officers arrived at his house. He stated that he had slept three hours the previous evening, had been awake thereafter, and this was not unusual for him. When appellee was arrested and taken to the police station, he was wearing a tank top and underwear. At the station, Detective Johns asked appellee if he knew why he was there and he said yes. Appellee had not been given any information about his arrest prior to that time. After asking appellee if he knew why he was there and appellee's response, Detective Johns advised appellee that Mr. Tolbert had identified appellee as the shooter. Appellee testified that he was "scared" and "shaky." Detective Johns advised appellee of his Miranda rights. Appellee stated that he understood them, and he invoked his right to counsel and to remain silent.

Appellee was thereafter placed in a holding cell. Several minutes later, Detective Johns and Officer Reese came in and gave appellee the statement of charges. Appellee stated that he saw the charges, saw that he was facing death, and heard Officer Reese say, "I bet you want

to talk now, huh?" Appellee testified that "I was just scared. I just got my charges and I was just shook." Detective Johns pushed Officer Reese out of the cell block but returned later and asked appellee if he wanted to talk. Appellee asked if he could, and Detective Johns said yes. Appellee denied that any conversation occurred when Detective Johns brought him his clothes, and stated that he received his clothes prior to the time that Detective Johns asked him if he wanted to talk.

Appellee testified that he decided to talk because of Officer Reese's comment and because of the content of the charges. With respect to the latter, appellee testified that he lived close to Mr. Tolbert, was friendly with him, and saw him frequently. Appellee learned from the statement of charges that Mr. Tolbert had advised the police that appellee shot the victim, took the victim's car keys from his pocket, and ran over the victim with the victim's car. Appellee further testified that he felt angry and betrayed, and he wanted the police to know the truth, i.e., that Mr. Tolbert was the one who shot and ran over the victim.

With respect to the polygraph examination, appellee testified that Detective Johns told him taking the test would help him and that later, Corporal White said the same thing.

Appellee explained that his two prior arrests were drug offenses. He was given juvenile citations and released to his parents. He was not given Miranda warnings on either of those occasions. Nevertheless, he had seen Miranda warnings on television, and he understood all of the rights.

Appellee stated that he was without his clothes less than an hour, and he was not cold after he received them.

In rebuttal, Sergeant Kirchner, Corporal Hannon, and Detective Johns testified. Sergeant Kirchner confirmed Detective Johns' testimony with respect to what Detective Johns had reported to him. Corporal Hannon denied that appellee had been told taking a polygraph test would help him. Detective Johns also testified that he did not tell appellee taking a polygraph test would help him, and that, at his first meeting with appellee, he did not say anything about Mr. Tolbert before giving appellee his Miranda rights.

The advisement of rights forms, containing Miranda warnings and appellee's initials, were introduced in evidence. One form was dated October 26, 2002 with a time notation of 5:11 a.m.; another form bears the same date with a time notation of 6:40 a.m.; and the third form bears the same date with a time notation of 9:20 a.m. The first form, in response to the question whether appellee would talk without a lawyer, contains the handwritten "no." The second form, in response to the same question, contains the handwritten "yes."

The statement of charges and application were also introduced into evidence. The application recites that on September 19, 2002 investigation disclosed that the victim had been shot in the head, his vehicle stolen, and that he had been run over with his vehicle. Additionally, on October 25, 2002, Mr. Tolbert, who had been identified as a suspect, was interviewed and admitted to being one of

two persons who had committed the crimes. Mr. Tolbert identified appellee as the other person and advised that appellee was the shooter and the driver. The statement of charges contained columns with the following headings: offense number, charge or citation number, the applicable statute, the penalty, and a description of the charge. The penalty entry is the maximum penalty allowed and is computer generated when a particular charge is entered into the system. At this stage of the proceedings, the penalty entries are not keyed to a particular defendant. The statement of charges contained the following charges and penalties: first degree murder – death; second degree murder – thirty years; armed robbery – twenty years; armed carjacking – thirty years; and use of a handgun – twenty years.

On June 3, 2003, the court granted the motion to suppress.

Circuit Court's Opinion

The State conceded that, after appellee was arrested and brought to the police station, he was in custody. The court, after acknowledging that, found the following. Appellee was immediately given Miranda rights. The court believed Detective Johns and Corporal Hannon, who testified that they did not advise appellee, prior to giving Miranda warnings, that Mr. Tolbert had accused appellee of being the shooter. The court found that appellee requested counsel and was taken to a cell at 5:25 a.m.

At approximately 6:00 a.m., Detective Johns and Officer

Reese went to appellee's cell. Detective Johns gave appellee the statement of charges, read them to him, and advised him that they were serious charges, he should read them carefully, and make sure he understood them. As Detective Johns turned to walk out, Officer Reese, in a confrontational loud voice, said "I bet you want to talk now, huh?" The court resolved the credibility issue in favor of Detective Johns and appellee and against Officer Reese with respect to whether Officer Reese made such a comment. Detective Johns escorted Officer Reese out of the area, stating in a very loud voice, "He already asked for a lawyer. We cannot talk to him now." The two officers left the area.

The court observed that the statement of charges reflected death as the penalty for first degree murder, that appellee was in fact not eligible for the death penalty, and that the penalty was included by mistake on the part of Detective Johns or the court commissioner.

Applying an objective test, the court held that the comment by Officer Reese constituted interrogation and that Officer Reese intended to elicit a response from appellee. The court concluded that the State had not met its burden of showing that appellee subsequently voluntarily, knowingly, and intelligently waived his right to remain silent after requesting counsel. Specifically, the court stated that the State failed to prove that the waiver was "in no way due to the unlawful and coercive interrogation coupled with Defendant's receipt of the charging documents erroneously indicating that he was facing the death penalty."

The basis of the circuit court's opinion was that Officer Reese's comment constituted interrogation in violation of Miranda and Edwards, thus making appellee's subsequent waivers invalid and his statements inadmissible. The court made it clear that its decision rested on a violation of Miranda and Edwards, and not that appellee's statements were otherwise involuntary. With respect to the second statement given during the polygraph exam, and referring to appellee's testimony that he had been promised help, the court observed that it was not convinced that any statements had been made to appellee, promising that taking the polygraph test would help him.

Standard Of Review

As recently stated by the Court of Appeals in White v. State, 374 Md. 232, 250 (2003):

> On appellate review . . . we will accept the facts as found by the hearing judge unless those facts are clearly erroneous. See Riddick v. State, 319 Md. 180, 183 (1990). In addition, the evidence is to be viewed in the light most favorable to the prevailing party, [in this case, appellee]. See id. Nevertheless, we will undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case. See id.

Discussion

The State contends that the comment made by Officer Reese was not interrogation. Alternatively, even if it was interrogation, (1) it was attenuated by appellee's reading of the statement of charges and application, properly given to him, because appellee's statements were in response to what appellee learned in the statement and application and not in response to the interrogation, and (2) appellee was re-Mirandized and validly waived his rights prior to his statements.

Appellee contends that Officer Reese's statement was interrogation and that appellee's statements were, at least in part, in response to the interrogation, and that this Court is bound by the circuit court's findings in both respects.

We shall begin by applying the general standard of review to this case. We accept the circuit court's determination that Detective Johns was a credible witness and that Officer Reese made the comment in question. While it is not entirely clear whether the circuit court found that Officer Reese subjectively intended to elicit an incriminating response, we shall assume that he did. As it is a question of constitutional law, however, whether the police actions constituted interrogation is subject to de novo review. Riddick, 319 Md. at 183.

The parties argued, and the court discussed, cases dealing with Fourth Amendment rights, Fifth Amendment rights, Sixth Amendment rights, Miranda rights, the exclusion of evidence as a sanction for violations, and

waivers of the above rights by a person in custody. Although it is clear, as previously stated, that the court's conclusion rested on Miranda and Edwards, it is not clear whether the court (1) held as a matter of law that appellee's statements were inadmissible as a result of what it found to be unlawful interrogation, regardless of whether the statements were in response to learning from the statement of charges and application that Mr. Tolbert had identified appellee as the leading participant, as distinguished from Officer Reese's comment, or (2) whether the court found, as a fact, that appellee's statements were, at least in part, in response to the interrogation and thus tainted by the Miranda violation.

We shall summarize some basic principles to narrow our focus to what we perceive to be the determinative issue. The exclusionary rule does not serve the same purpose in Fourth Amendment and Fifth Amendment jurisprudence. Consequently, the fruit of the poisonous tree doctrine, a concept related to the exclusionary rule, is applied differently, depending on the nature of the violation. Oregon v. Elstad, 470 U.S. 298, 303-04 (1985).[2] In the former, the concern is with police conduct; in the latter, the concern is with trustworthiness of the information. Id.

---

[2] The fruit of the poisonous tree doctrine requires a primary illegality and a cause and effect relationship between it and the evidence. The fruit is not poisoned if sufficiently attenuated from the illegality, was obtained from an independent source, or would have been inevitably discovered. See Judge Moylan's discussion in Gibson v. State, 138 Md. App. 399, 402-19 (2001).

Compare State v. Lee, 374 Md. 275, 297-98 (2003) (noting that the primary reason for excluding evidence obtained as a result of a Fourth Amendment violation is to prevent improper police conduct), with Ashford v. State, 147 Md. App. 1, 41-41 (2002) (citing Elstad and noting that the exclusionary rule, as applied to the Fifth Amendment, "is concerned with the ultimate trustworthiness of the evidence.").

In Oregon v. Elstad, the Supreme Court did not apply the traditional fruits doctrine, as developed in Fourth Amendment cases, to a Miranda violation. 470 U.S. at 318. A Miranda violation does not necessarily prevent subsequent statements from being admitted into evidence if the defendant is properly Mirandized before the statements are given and the statements are otherwise voluntary. Id. In other words, a mere Miranda violation, if followed by a voluntary and knowing waiver, does not trigger exclusion under the fruit of the poisonous tree doctrine. Id.

Apart from the Sixth Amendment, when a defendant requests an attorney, however, as opposed to merely invoking his or her right to remain silent, additional protections come into being. Edwards, 451 U.S. at 484-85. Once a person in custody requests the presence of an attorney, all interrogation must cease until an attorney has been provided. Id.; Miranda, 384 U.S. at 436. In that situation, the person in custody can initiate an exchange with the police and voluntarily speak, but the police cannot initiate the interrogation; if a statement is made in response to such an interrogation, the statement will be

suppressed. Edwards, 451 U.S. at 484-85. The act of re-Mirandizing, standing alone, even if voluntary in the traditional sense, will not avoid such a result. Id. The rule enunciated in Edwards was based on the rights outlined in the Fifth and Fourteenth Amendments. 451 U.S. at 480.[3]

That does not mean, however, that any and all subsequent statements by a defendant, made without counsel, are necessarily in response to the interrogation. See Correll v. Thompson, 63 F.3d 1279, 1287 (4th Cir. 1995). In the case before us, appellee testified that he felt angry, betrayed, and scared when he learned from the statement of charges that Mr. Tolbert had identified him as the shooter and driver and when he saw the possible penalties for this crime.[4] Appellee also referred to Officer

---

[3] The inquiry into who initiated the conversation is separate from the issue of whether the accused waived his previously asserted right to counsel. Radovsky v. State, 296 Md. 386, 401 (1986) (quoting Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality). In addition to proving the conversation was reinitiated by the accused, the State also bears the burden of demonstrating that the accused voluntarily, knowingly, and intelligently waived his right to counsel. Id. In other words, the fact that an accused initiates the conversation with the police does not end the waiver inquiry.

[4] It is well-settled that the act of giving the application and statement of charges to appellee did not constitute interrogation. See State v. Conover, 312 Md. 33, 39 (1998). See also, discussion infra.

Reese's comment, however, when he explained why he changed his mind and decided to talk. Consequently, pursuant to our standard of review, regardless of whether the circuit court found as a fact that appellee's statements were at least partially in response to Officer Reese's comment or excluded appellee's statements as a matter of law, we shall assume that both statements were, at least in part, in response to Officer Reese's comment. Appellee was in custody when he gave his statements, and there is evidence that he invoked his right to counsel when he was first given his Miranda rights.

The net effect of the above is that the result in this case is determined by whether Officer Reese's comment, considering the totality of the circumstances, constituted interrogation after appellee invoked his Miranda rights, including the right to consult with counsel, and prior to the time that he indicated that he wished to speak to police.

Interrogation includes not only express questioning but also its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). In Innis, the defendant was in custody, given Miranda warnings, invoked his right to counsel, and, while being transported to the police station, the police officers spoke to each other about their concern for the safety of children because a shotgun had not been recovered. Id. at 294-95. The defendant spoke, and the Supreme Court held that the defendant had not been interrogated. Id. at 302.

The Court explained that interrogation includes "words or actions on the part of the police (other than those

normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301. This portion of the definition focuses on the perceptions of the person in custody, rather than the subjective intent of the police. Id. "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." Id. With respect to intent, the Court continued:

> This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

446 U.S. at 301, n.7.

The Court acknowledged its awareness that police officers might use various techniques of persuasion, such as using coached witnesses to identify the person in custody, and thus, interrogation was not limited to express questioning. Id. at 301-02. The concern in Miranda was that interrogation in custody would "subjugate the individual to the will of his examiner." 446 U.S. at 299. In reversing the Rhode Island Supreme Court, the Supreme Court acknowledged the state court's finding that

the defendant had been subjected to "subtle compulsion," but held that such behavior was not enough to constitute the functional equivalent of interrogation. 446 U.S. at 303.

The Court of Appeals interpreted and applied Edwards in Radovsky v. State, 296 Md. 386 (1983). In that case, the defendant was given Miranda rights, refused to waive them, and invoked his right to counsel. Id. at 387. The State conceded that it initiated the subsequent questioning of defendant, but argued that a subsequent waiver of his right to have counsel present attenuated the violation. Id. at 392. See Michigan v. Mosley, 423 U.S. 96 (1975). The Court, relying on Edwards, distinguished between the invocation of the right to remain silent and the right to have counsel present, and held that inculpatory statements obtained after the interrogation were inadmissible.[5] Id. at 398-99.

In determining whether the police interrogated appellee prior to the time that he asked to speak to Officer Johns, we consider the totality of the circumstances. Hughes v. State, 346 Md. 80, 95, 98 (1997). The test is objective; "whether the police officer, based on the totality of the circumstances, knew or should have known that the question was reasonably likely to elicit an incriminating response." Id. at 95-96. The subjective intent of the

---

[5] The Court also noted that even if the person in custody initiates the interrogation by police after invoking a right to counsel, the prosecution still must show a valid waiver.

police officer in making the statements does not control. Id. at 100.

Importantly, following Innis, the Court of Appeals recognized that "[n]ot all police conduct that may cause a defendant to speak constitutes interrogation." State v. Conover, 312 Md. 33, 39 (1988). In Conover, the Court held that after the defendant requested an attorney, the actions of the police in reading a statement of charges and giving the defendant a copy of the statement and the application was not interrogation. Id. at 44-45. Consequently, the subsequent statement by the defendant was not excluded. Id. at 45. The Court reached the same result in White v. State, 374 Md. 232 (2003). In that case, the defendant invoked his right to counsel, the police read the charging document to him, and the defendant gave an inculpatory statement. Id. at 248-49. The Court held that the police conduct did not constitute interrogation, and the defendant's statement was not excluded. Id. at 254.

In the case before us, it is clear that simply providing appellee with the statement of charges and the application was not an interrogation. As the Court of Appeals observed in the above cases, the rules require that the charging document be served on the defendant. Maryland Rule 4-212(f). The charging document revealed to appellee the charges against him and the maximum penalty for those charges. As is customary, the statement was not tailored to appellee, and the police did not know prior to the statements in question that appellee was under age 18. Additionally, it was not interrogation to provide a copy of the application which contained information obtained from

Mr. Tolbert.

Appellee relies on Drury v. State, 368 Md. 331 (2002), but that case is distinguishable. In Drury, prior to being given Miranda warnings, the defendant was shown physical evidence and told that it would be processed for fingerprints. Id. at 337. The defendant was brought to the police station for the express purpose of questioning, and had been informed as much when he arrived. Id.

Appellee also relies on Hughes v. State, 346 Md. 80 (1997), but that case is also distinguishable. In Hughes, the Court of Appeals applied an exception to Miranda, known as the routine booking exception. Id. at 83. The Court held that the exception did not encompass a question on an arrest intake form that inquired whether the arrestee was "a narcotics or drug user." Id. at 97. It was clear that the defendant was being questioned. Id. It also seems clear that the question could reasonably be expected to elicit incriminating information. Id. at 98. Consequently, the admission in evidence of the response was error, absent Miranda warnings. Id. at 100-01.

In our view, this case is very similar to Williams v. State, 342 Md. 724 (1996). In Williams, the defendant was convicted of first degree murder and related offenses and received the death penalty. Id. at 731. The Court reversed the convictions for reasons not here material, but addressed issues likely to arise on retrial. Id. One of those issues was the defendant's motion to suppress statements made to the police. Prior to Miranda warnings, a police officer showed the defendant a photograph portraying him

using the victim's ATM card, and the defendant admitted it was him. Id. at 759. The defendant was then advised of his Miranda rights, and he invoked his right to remain silent and his right to counsel. Id.

The following transpired:

> As the officers began to gather their papers, one of the officers told Williams to remove his earring and Williams mumbled under his breath, 'you can't get me. I'll just say a girl gave me the card.' After this second statement, Detective Zywiolek testified that he commented that 'this is going to work' and reiterated to Williams that he was being charged with the murders of Gilbert and Trias. At that point, Williams made a third statement: 'I know I'm never getting out.'

342 Md. at 759. The Court held that the police actions did not constitute interrogation and Williams' second and third statements were not excluded. Id. at 760-61. The Court explained that the statement, "This is going to work," coupled with again advising the defendant that he was being charged with two murders, "simply advised Williams that police had evidence they believed established Williams's guilt in a double homicide, and as a result was being charged with murder." Id. at 761.

In the case before us, Officer Reese's comment was made during the non-interrogation procedure of giving appellee the charging document and the application. Appellee was in his cell; he was not taken anywhere for

questioning. The comment by Officer Reese was a blurt; viewed objectively it was rhetorical in nature and there was no actual questioning of appellee.

The comment was an obvious reference to the evidence in the possession of the police, as reflected in the application for charges. Regardless of what Officer Reese's intent might have been, the totality of the events indicate that appellee was not expected to respond, and he did not respond. There is no evidence that the events were part of a practice by the police designed to elicit incriminating information; it is to the contrary. Appellee was not "badgered" or subjected to "compelling influences" or "psychological ploys." See Conover, 312 Md. at 45. The statement by Officer Reese was not the functional equivalent of actual questioning, but was the functional equivalent of the statement in Williams, "This is going to work." Each was a reference to the evidence against the person in custody that the police had in their possession.

We hold that the police actions in question did not constitute interrogation.

ORDER GRANTING APPELLEE'S MOTION TO SUPPRESS REVERSED. COSTS TO BE PAID BY APPELLEE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 771

September Term, 2003

STATE OF MARYLAND

V.

LEANDER JEROME BLAKE

Eyler, James R.,
Karwacki, Robert L.,
(Retired, specially assigned),
Bloom, Theodore G.
(Retired, specially assigned),

JJ.

Dissenting Opinion by Bloom, J.

Filed: October 29, 2003

Respectfully, I dissent.

I agree with most of the majority opinion. My sole point of disagreement with it is the majority's conclusion that, as a matter of law, the comment made by Officer Reese to appellee after the statement of charges and the application therefor were handed to appellee—"I'll bet you want to talk now, huh!"—was not the functional equivalent of interrogation. That one point of disagreement compels me to dissent from the decision of the majority to reverse the order of the circuit court granting appellee's motion to suppress inculpatory statements he made after he had requested a lawyer upon being advised of his *Miranda* rights.

The suppression motion hearing judge made specific findings of first level facts, which this Court must accept unless they are clearly erroneous. *Riddick v. State*, 319 Md. 180, 183 (1990). Of particular significance to this case were her findings (1) that when Officer Reese said to appellee, "I'll bet you want to talk now," he intended that comment to induce appellee to talk, *i.e.,* to make an incriminating statement, without waiting for advice of counsel; and (2) that Officer Reese's comment was a factor in inducing appellee to waive his right to counsel and tell Detective Johns his version of what occurred in the events that led to his arrest.

There is no contention that those findings of intent and motivation were not findings of first level facts. In the words of Lord Bowen's famous aphorism, "The state of a man's mind is as much a fact as the state of his digestion. *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459, 483.

Nor is there any contention that those findings were erroneous or that there was no evidence to support them. The finding that Reese's comment was a factor in appellee's decision to waive his right to counsel and tell his version of the events to Detective Johns is supported by his testimony to that effect. The finding that Officer Reese intended his comment to induce appellee to talk, *i.e.*, to tell his version of the event without waiting for advice of counsel is supported by the surrounding circumstances. Detective Johns had read the list of charges to appellee, handed appellee the statement of charges with the application therefor, and told him to read them carefully and that the charges were serious. Then, as Johns turned to walk out, Reese said in a loud voice and a confrontational tone, "I'll bet you want to talk now, huh!" The only logical conclusion was that Reese was suggesting that, when appellee read the charges, with the maximum penalty for each charge noted, and Tolbert's assertion that appellee was the one who killed the victim, he would want to tell his version "now." Detective Johns clearly thought so. He was surprised and angry; he pushed Reese out of the cell and he said that Reese had interjected police interrogation into a situation in which appellee had invoked his right to counsel. He testified that he was afraid that Reese had violated appellee's right to counsel.

Despite the factual determination by the motion hearing judge, the majority hinges its decision on the proposition that whether police actions constitute interrogation is a constitutional law question and thus subject to *de novo* review, citing *Riddick*, 319 Md. at 183.

The evidence clearly shows that when Detective Johns returned to the holding cell to deliver appellee's clothing to him, appellee initiated the ensuing interrogation; he wanted to talk about the case. During the relatively short period of time before Johns returned to the holding cell with appellee's clothes, appellee had read the statement of charges with the computer generated maximum penalty (death for first degree murder) clearly stated thereon, and he was frightened. He had also read the police application for the charging document and was disturbed by Tolbert's accusation that appellee had shot and run over the victim with the carjacked vehicle. And he had thought about the meaning of Reese's statement, which indicated to him that it was in his best interest to make a statement promptly, so that the police would know the truth about what Tolbert said. Certainly appellee's inculpatory statements were made voluntarily. The issue, however, is whether they were induced by a "substantial equivalent of interrogation" that influenced his waiver of a right to counsel.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court explained that, once an individual has requested counsel, a subsequent statement by him is not tested by the standard of voluntariness; the issue is whether there was a knowing and intelligent waiver of the right to counsel.

> "Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S. at 474.

451 U.S. at 485. *See also Michigan v. Mosley,* 423 U.S. 96 (1975).

Prior to *Edwards,* the Court, in *Rhode Island v. Innis*, 446 U.S. 291, had addressed the meaning of "interrogation." It stated:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questions or its functional equivalent. That is to say, the term interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

446 U.S. at 300-01.

That "interrogation" or the functional equivalent thereof need not be in the form of questions, or even verbal, is illustrated in *Drury v. State,* 368 Md. 331, *cert. denied,* 537 U.S. 942 (2002). In that case, the Court of Appeals held that the conduct of a police officer in placing in front of the defendant, before he had been advised of his *Miranda* rights, the tire iron used in a burglary and a trash bag containing stolen magazines and then telling the defendant that the evidence will be processed for fingerprints, was the functional equivalent of

interrogation.

The motion hearing judge correctly concluded that Officer Reese should have known that his statement to appellee was reasonably likely to elicit an incriminating response from appellee. She had found as a fact that Reese intended his comment to elicit such a response. And as the majority opinion recognizes, the officer's intent may have a bearing on whether he should have known that his words "were reasonably likely to evoke an incriminating response." Slip op. at 18. In short, based on the evidence and the first level facts she found on the basis of evidence, the motion hearing judge properly ruled that Reese's remark was the functional equivalent of interrogation; that as such it violated appellee's constitutional rights; and that the State had not met ".ts heavy burden" of proving a voluntary, knowing, and intelligent waiver, uninfluenced by Reese's improper comment. On that basis, she held that all statements made by appellee at the Annapolis Police station and at the State Police Barracks (where the polygraph examination was conducted) were suppressed.

I am aware that, by virtue of Maryland Code (1974, 2002 Repl. Vol.), § 12-302(c)(iv) of the Courts and Judicial Proceedings Article, an affirmance of that suppression ruling would result in dismissal of all charges against a defendant who had voluntarily admitted his participation in a carjacking and murder. That would be an extremely harsh penalty for the State, which was not prepared to proceed to trial without the suppressed evidence. Dura lex sed lex.

APPENDIX C

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,	*	
	*	
v.	*	Criminal Nos. K-2002-2154
	*	K-2002-2417
LEEANDER JEROME BLAKE,	*	
	*	
	*	
Defendant.	*	
	*	Annapolis, Maryland
		June 3, 2003

MOTIONS HEARING

WHEREUPON, proceedings in the above-entitled matter commenced.

BEFORE: THE HONORABLE PAMELA L. NORTH,
Judge

APPEARANCES:

FOR THE STATE:

FREDERICK M. PAONE, Esq.
PAMELA ALBAN, Esq.
Office of the State's Attorney
Circuit Courthouse
7 Church Circle, Suite 200
Annapolis, Maryland 21401

PROCEEDINGS

THE COURT: Good morning, everyone. You can be seated.

MR. PAONE: Good morning, Your Honor. If it please the Co rt, the State would call State versus Leeander Jerome Blake, K-2002-2154 and 2417. I am Fred Paone on behalf of the State.

MS. ALBAN: I am Pamela Alban.

THE COURT: Good morning.

MR. RAVENELL: Good morning, Your Honor. For the record, Ken Ravenell and Ivan Bates on behalf of Leeander Blake.

THE COURT: And for the record, Mr. Blake is present in the Courtroom. All right. We are here, of course, today for me to give you my oral opinion on the motion to suppress in both of these cases.

I am going to start with the law. Under Miranda versus Arizona, the defendant must be informed of his right to counsel and right to an attorney prior to any custodian interrogation.

The Miranda court stated,

"If the accused indicates that he wishes to remain silent the interrogation must cease. If he requests

counsel the interrogation must cease until an attorney is present. This is an important distinction highlighted in many, many subsequent opinions."

That is the difference between asking for an attorney and simply saying you want to remain silent.

"The right to have counsel present can be waived, of course, but the waiver of counsel must not only be voluntary, it must also constitute a knowing and intelligent relinquishment or abandonment of a known right. A matter which depends in each case upon the particular facts and circumstances of each case."

That is taken from Johnson versus Serbs. "The state must prove an intentional relinquishment or abandonment of a known right or privilege." Again, from Johnson versus Serbs.

"Courts indulge every reasonable presumption against waiver." Supreme Court case, Brookhart versus Janis, 384 United States 1. Also quoted in Johnson versus Serbs, and quoted in a number of a number of Maryland cases as well.

Edwards versus Arizona at 451 United States 477, is most instructive in this case. It makes two points crystal clear. In that case the Supreme Court pointed out that the state court may have, in fact, been correct when it assessed that Edwards' statement was given voluntarily.

But that the state court completely missed the mark by not focusing on whether he had made a knowing and intelligent waiver of his right to counsel. By focusing on whether the giving of the statement was voluntary, the court stated, quote,

> "It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel once it has been invoked."

That is at page 484.

In the Edwards case, I quote,

> "Although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation. The court has strongly indicated that additional safeguards are necessary when that accused has asked for counsel.
>
> And we now hold that when an accused has invoked his right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights.
>
> We further hold that an accused such as Edwards having expressed his desire to deal with the police

> only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Again, that is Edwards at page 484.

> "A statement made to a person in custody, which is reasonably likely to elicit an incriminating response has been repeated held to be interrogation. Whether it is in fact a question. Whether it is a statement. Or any number of acts which have been held to the functional equivalent of interrogation."

That is cited as Brewer versus Williams.

State versus Connover at 312 Md. 33, held that police reading a statement of charges to a defendant and handing him copies did not constitute interrogation. And, therefore, did not deprive him of the Fifth Amendment right to counsel.

However, confronting a defendant in custody with physical evidence of a crime and telling him that the evidence would be processed for prints was held to be an example of the functional equivalent of interrogation.

Showing the defendant a copy of an incriminating document has been held to be the functional equivalent of interrogation.

In White versus State, the Maryland Court of Appeals held that when police officers disclosed the contents of a charging document to a suspect in custody, after he had invoked his Miranda rights, there was no impropriety because Maryland Rule 4-212 required them to serve the charging document on the defendant.

White also stated that a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privileged against self incrimination and his right to counsel when it attempts to prove a waiver of Miranda rights.

And just as an interesting aside, it's interesting that the ease law talks repeatedly about that the case law talks repeatedly about the heavy burden on the State to demonstrate a knowing intelligent waiver. And they never define that. They just say it's a heavy burden. They don't say anything that we would understand. They don't say preponderance or clear and convincing or what.

In contrast, as the State pointed out, and I think correctly in their memo, the burden appears to be simply preponderance for showing voluntariness. So, we are talking about two different issues. Voluntariness versus the burden that rests on the State to show a knowing and intelligent waiver.

The White case further stated,

"Even if a question appears innocuous on its face, however, it may be beyond the scope of the

routine booking question exception if the officer knows or should know that the question is reasonably likely to elicit an incriminating response. Assessment of the likelihood that an otherwise routine question will invoke an incriminating response requires consideration of the totality of the circumstances in each case. With consideration given to the context in which the question is asked.

The fact that the answer to a booking questions assists the prosecution in proving its case is not determinative of whether a standard booking question, when posed, was likely to elicit an incriminating response. A benign question in one case may amount to interrogation for which Miranda warnings would be required in another case.

Therefore, courts should carefully scrutinize the factual setting of each encounter of this type keeping in mind that the critical inquiry is whether the police officer based on the totality of the circumstances knew or should have known that the question was reasonably likely to elicit an incriminating response."

That language, I feel is very, very important in this case. Again,

"Courts should carefully scrutinize the factual setting of each encounter keeping in mind that the critical inquiry is whether the police officer [,] based on the totality of the circumstances [,] knew or should have known that the question was reasonably likely to

elicit an incriminating response.

> Consequently, our holding in Hughes reaffirms that our case by case review should focus on the conduct of law enforcement officers in obtaining the incriminating statement when assessing whether a Miranda violation has taken place."

In Ratavosky, similar to this case, defendant after being arrested for burglary invoked his right to counsel. Over the next two days police initiated conversations with him relative to other crimes. Ratavosky later signed a Miranda waiver form waiving his right to counsel and his right to remain silent.

These statements were ultimately suppressed by the court because the police initiation of conversations with the defendant was improper. This is a case like Mr. Blake's where he has invoked his right to counsel, was re-Mirandized and he waived rights on paper and the court still found no valid waiver existed.

Like Edwards versus Arizona, the case of Michigan versus Mosely distinguishes between an invocation of a right to an attorney and in invocation of the right to remain silent. An attorney must be furnished before any interrogation occurs when defendant has requested counsel.

Fair versus Michael, another Supreme Court case at 442 United States 707, stated, "There is a per se prohibition against all interrogations after an arrestee has requested

counsel."

In Ratavosky, three hours passed between his invoking right to counsel and police interrogation. In Edwards versus Arizona, 12 hours. And in our case it's either 28 minutes if you are looking at the first statement. Or one and a half to two hours if you are looking at the second statement.

Ratavosky further stated, quote,

> "But even if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel is initiated by the accused where reinterrogation follows, the burden still remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during that interrogation."

Most interesting to me is the fact that Ratavosky's entire analysis is a Miranda analysis. Not a voluntariness of confession analysis. Leading to the conclusion that where there is a Miranda violation of the defendant's right to have counsel present before any interrogation occurs, the court's initial and primary focus should not be on whether or not the confession was voluntary. But as in Edwards[,] and Edwards made clear[,] a knowing and intelligent waiver existed.

Finally, worth mentioning are the cases Kaupp versus Texas, a May 5, 2003 Supreme Court decision and Jones

versus State of Maryland, at 311 Md. 398. Jones essentially stands for the proposition that where the arrest of a juvenile is concerned, parental notification or the presence of parents are important factors in determining voluntariness of a confession, but lack of access to parents does not automatically make the juvenile's statement inadmissible.

Kaupp is a case decided on a slight different issue. An illegal arrest. But it is very similar to our case factually. In that case a 17 year old was removed from his house at 3:00 in the morning, awakened from his bedroom with a flashlight, handcuffed, shoeless, in boxer shorts and a t-shirt.

That case citing Brown versus Illinois, another Supreme Court case with approval, held that Miranda warnings alone and per se cannot always break for Fourth Amendment purposes the causal connection between the illegality and the confession.

The State urges the Court to take an approach where voluntariness is considered first and asks the question, was the Defendant's will overborne by any improper police conduct. I believe the case law requires instead, on these facts and these issues, that the Court analyze the Miranda slash right to counsel issue first.

In fact, as Ratavosky instructs, where there is an insurmountable Miranda violation sometimes the Court does not get to the voluntariness of the confession itself.

This is true simply because as Edwards versus Arizona makes clear, waivers must meet three types of criteria. One, voluntariness. Two, they must be knowing. And three, it must be an intelligent relinquishment of known rights. Not just voluntariness of confession.

It is important not to fall into the same trap as did the Arizona State Court in Edwards versus Arizona, and focus solely on whether the confession was given voluntarily instead of focusing on whether the Defendant understood his right to counsel and intelligently and knowingly relinquished it.

So I am convinced the first inquiry for this Court must be made on the right to counsel issue. Here, we have a 17 year old young man removed by force on a chilly October morning somewhere between 4:30 and 5:00 o'clock in the morning. Ordered at gunpoint to lay on the floor. He is handcuffed. Removed from his home in his underwear with no shoes on.

Circumstances were sufficiently compelling that Defendant apparently said, "Don't shoot" to the officers. Approximately a dozen armed police officers were present inside and out without consultation with or knowledge of his mother. He was taken directly to a police car out front and driven three to four miles to the Annapolis Police Department.

This 17 year old is of average intelligence. Can read and write. Completed the tenth grade. Had thoughts of going to college and becoming an electrician. And was

very polite and cooperative with authority figures.

This 17 year old had been arrested for drug charges on two prior occasions, but had never been advised of Miranda rights or interrogated by police before. He was sober, not on any medication, had used marijuana numerous times in the past, but there was no evidence of any use near the time of his arrest. He indicated he had a sip of alcohol at 9:00 or 10:00 the previous evening.

The first question I would ask is was he in custody? I believe the State concedes that he was. He was arrested, cuffed pursuant to a valid arrest warrant. And was not free to leave. He was therefore in custody.

The next question I would ask is was he advised of his rights pursuant to the Miranda decision? The answer should be yes. And it is. Immediately he was advised. I believed both Officers Johns and Hannon when they testified the Defendant was not told of his charges or advised of the fact that Tolbert had accused him of being the shooter. Neither Johns or Hammond were armed. And they were the only two present with the Defendant.

Next question, did Blake invoke his right to counsel? The answer is yes. He requested the presence of an attorney before any questioning could occur. He signed an advice of rights form at 05:11 hours. At this point, Miranda and Edwards require that the Defendant be afforded an attorney before any interrogation by police.

There were no questions or interrogation by police at

this point. He was then transported to a cell by 5:25 a.m. in the morning. Evidence revealed that the cell was chilly, cold, and room temperature. All three different descriptions that Detective Johns gave at various times in his testimony.

The Defendant was still in underwear with no shoes on. During this time, the Defendant made no statements and asked no questions. There was, as of this point, no indication the Defendant would change his mind.

At approximately 6:00 a.m., Detective Johns and Officer Reese, and Officer Reese, by the way, was the same officer who had previously transported the Defendant to the Annapolis Police Department. They both walked back to his cell.

As in Edwards, Defendant did not request or suggest that the officers should come back to his cell. Defendant was awake. Johns took the statement of charges back to the Defendant, handed them to him, and read the charges to him. Johns testified, and this is a quote, "I said to him, they are serious charges. He needs to read it carefully and make sure he understood it."

As Johns turned to walk out, Reese said, in a confrontational loud voice, "I bet you want to talk now, huh!" Johns testified he was surprised by this. Later, Sergeant Kirchner testified that he observed that Johns was very angry about this. And it was told that Johns put his hands in front of him and pushed slashed escorted Reese out of the area, stating in a very loud voice, "He

already asked for a lawyer. We cannot talk to him now."

They left and shut the door. It should be noted that almost contemporaneously with Reese's statement, Johns had handed Defendant the statement of charges, read them to him, advised him that they were serious charges and that he should read over them.

He also erroneously served him with a document which stated that the penalty for count one murder was death. The word death being written in all capital letters. Defendant was, in fact, not eligible for the death penalty.

This was either done intentionally or by mistake. Given the Court's perception of Detective Johns' testimony on the whole, however, as being very credible, and even testifying to matters which are certainly not in his best interest, I believe this was done by mistake on his part or on the commissioner's part.

No matter who was responsible for death being typed in capital letters on the penalty section for murder, it was still State action.

So the next question is was there interrogation? Was there a statement made by the police which the police knew or should have known would be reasonably likely to elicit an incriminating response? That answer has to be yes. And, in fact, I had already concluded as much at the motions hearing.

Under the relevant case law which I have now had an

opportunity to study since that day, there is simply no possible interpretation of Reese's statement and the manner in which it was made which could indicate that it is not interrogation.

The Defendant had seen Reese before. Reese transported him to the police department. It cannot be said that that statement was a part of the routine booking questions.

Detective Johns testified that Reese knew that Mr. Blake had invoked his right to counsel before they went back to the cell. The State in its memorandum has variously characterized Reese's statement as, I quote, "A single off handed statement." Later it was characterized as, again quote, "A snide off handed comment." And again, the State characterized it as, I quote, "An improper off handed comment by an inexperienced police officer."

The State goes on to point out that there was no common design between Johns and Reese to get the Defendant to talk. The State further argued that Johns took corrective measures immediately after he heard Reese make that remark.

The State wrote in its memo, and I quote,

"These actions taken on the part of Detective Johns clearly eliminate any notion that Officer Reese's comment was designed to elicit any type of response from the Defendant."

On the contrary, what those actions by Detective Johns suggest is precisely what he stated at the motions hearing, which was that Reese had interjected police interrogation into a situation where Defendant had invoked his right to counsel. He testified he was very concerned that Reese's statement to Defendant violated his right to counsel. And I think Detective Johns was right about that.

I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement.

There is no requirement in a right to counsel analysis that more than one police officer intend to elicit an incriminating statement from a Defendant. The fact that Johns may not have intended it and other members of the police department did not intend it, does nothing to negate Reese's obvious intent.

So the question is how do we know what Reese intended. Well, let's analyze the remark he made. Defendant is handed a statement of charges indicating to him, a 17 year old, indicating to him for the first time that he is being charged with murder and he can get the death penalty.

Reese's statement was, "I bet you want to talk now, huh!" This is not a vague appeal to Defendant's conscious like the remarks were in Brewer versus Williams. First, the statement, itself, suggests he should want to talk. And the word, "now" that is, "I bet you want to talk now"

clearly refers Defendant to what has just been handed to him.

In other words, look at those charges, look at that penalty, and I'll bet you will want to talk. What ever other meritorious arguments the State makes with reference to this motion, it is simply impossible for this Court to conclude that that particular statement is not interrogation.

It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is indirect response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement.

So, until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them. Since 28 minutes had passed, he asked, "I can still talk to you?" Even though that period of time had passed.

Is there any possible interpretation of that statement that it is, as the State has urged the Court to find, simply an innocent offhanded comment not meant or expected to elicit an incriminating response? I don't think so.

Examples of innocent offhanded comments not likely to elicit an incriminating response would be, quote, "Here are some clothing for you." Or, "Please move away from the door so I can unlock it." Or, "Do you need a drink of water."

United States versus Walker instructs courts to look at

the context in which the statement is made. Once again, the context is the statement was made to a 17 year old with no Miranda or interrogation experience, who was still in a chilly cell in his underwear with no shoes on, without a parent present or available, just as he is being handed papers advising him he is charged with murder and can get death.

The statement invites him to look at those documents when Reese says "now" because nothing else has occurred but the handing over of those documents to which Reese could possibly be referring.

The law states that merely giving the Defendant a copy of his charges does not amount to interrogation and is part of a lawful booking process. Had Defendant been handed a statement of charges indicating he was charged with shoplifting or possession of marijuana, with maximum penalties of 18 months or one year, Reese's statement would not have had nearly the impact it did in this case.

That statement, under these circumstances, was enough to make an adult repeat offender squirm, not alone a 17 year old.

To conclude on this issue there was interrogation before counsel had been provided to Blake. The interrogation was of a coercive nature. And spoke directly to getting the Defendant to talk. And that constituted a violation of the holdings in Miranda and Edwards versus Arizona.

The Court must address though the obvious conflict in

the evidence about whether Officer Reese was ever even in that cellblock along with Detective Johns. And whether he ever made the statement to the Defendant which has been attributed to him.

The Court finds Detective Johns to be the more credible witness. That is more credible than Officer Reese. This is for a number of reasons. Number one, police are not likely to make up facts which are highly damaging to their own case. If police were inclined to make up facts, common sense dictates that those facts would be helpful to their case and not harmful to their case.

Two, Detective Johns testified in a manner which I found convincing and truthful. Three, Detective Johns did not keep this whole matter a secret like he could have. He could have been dishonest. He could have withheld this. Instead he told his supervisor about it, who told him to put it in a report, which he did.

Four, Officer Johns' version is corroborated by the Defendant's version. Five, Officer Reese is the only person who said Defendant spontaneously sated, not in response to any question or remark, "I want to talk to someone." Followed by Reese saying, "Who?" And the Defendant saying, "The detectives."

Officer Reese's testimony regarding other issues about who was at the station first conflicted with Officer Hannon's and Detective John's testimony.

And finally, my seventh reason, Sergeant Kirchner's

testimony regarding what Detective Johns told him on October 26th is almost identical to what Officer Johns' testimony was and not even close to what Officer Reese's testimony was.

So I believe Officer Johns' version and not Officer Reese's version. To add to the coercive nature of the situation in the cellblock, I was struck by how much this scene looked like a good cop, bad cop routine. Not that there is anything per se illegal about good cop, bad cop, as an interrogation technique, if the interrogation does not otherwise afoul of the law.

This view of the actions of the police in the cellblock bolsters the Defendant's testimony when he stated he was scared, shook when he heard Reese make that remark and saw he was facing death.

The police testified Defendant was calm, polite and cooperative. Reese appears in this setting, in that cellblock, as an out of control, not by the book, police officer, being reigned in by Detective Johns when Johns pushes Reese out of the cell and states in a loud voice that the Defendant said he wanted an attorney. This adds to the coercive atmosphere. It does not detract from it.

Now I turn to wether the Defendant voluntarily, knowingly, and intelligently waived his right to an attorney. At about 6:28 a.m., Detective Johns returned with clothing for the Defendant. The Defendant has been in police custody since 5:08 and at the Annapolis police department since 5:11, and in the cell since 5:25.

So at least one hour he has been in the cell without clothing. No counsel has been provided to him. Defendant says, "I can still talk to you?" Defendant has no initiated a conversation with Johns after he has been interrogated without counsel 28 minutes earlier.

Defendant was asked if he changed his mind and he stated, "Yes." Detective Johns was interested in knowing why the Defendant changed his mind, but he did not inquire. Defendant was readvised of his Miranda rights, signed the form indicating he would speak to them without an attorney.

Aside from what occurred at 6:00 o'clock that morning, there had been no other threats, physical coercion, or promises made at this point to get the Defendant to talk. Defendant never requested to see or speak with his mother.

It is of some concern, however, that Detective Johns did not testify that he made any effort, whatsoever, to obtain an attorney for the Defendant so that he could question him. Defendant thereafter made an incriminating statement.

At this point the State has a heavy burden of proving that a Defendant voluntarily, intelligently, and knowingly waived his previously invoked right to counsel. And that his pro forma waiver was in no way due to the unlawful and coercive interrogation coupled with Defendant's receipt of the charging documents erroneously indicating that he was facing the death penalty.

Detective Johns testified that he did not know if Reese's comment had had an impact on the Defendant's change of mind. But again I quote from Ratavosky,

> "Even if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel is initiated by the accused where reinterrogation follows the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation."

Here, Defendant is still in custody, still at the Annapolis police department. Only 28 minutes has gone by since the illegal interrogation. Enough time for him to read the charging document and only one hour and 17 minutes since he invoked his right to counsel.

He is still 17 years old. Still undressed. Still in a cold cell, where he is facing death. And an officer had made a case for him to speak now through that officer's coercive statement.

He has no parent present. The Defendant testified that he was scared and cold and though he was facing death. The State urges the Court to accept that Officer Reese's statement did not impact the Defendant's change of mind, but the Defendant changed his mind after reading the statement of charges and learning his co-defendant had pointed to him as the shooter.

And further, that since it has been held that the mere act

of providing a defendant with a statement of charges does not amount to unlawful interrogation, it was not an illegal police action which prompted him to confess.

The problem is there is very little evidence of that. Defendant conceded he learned that Tolbert blamed the murder on him and that he wanted the police to know the truth about these statements.

The State has not met its heavy burden of proving a voluntary, knowing, and intelligent waiver or showing that he was not still suffering under the impact of Reese's unlawful course of interrogation.

Once Defendant made certain incriminating statements, he was then asked by Detective Johns if he wanted to take a polygraph. This is all one continuous stream of events. There was no break in time or place here. No attenuation.

Defendant testified he asked if it would help him and Detective Johns said, "Yes." Detective Johns and Detective Hannon testified that it was possible that the Defendant could have been asked that question.

Detective Hannon testified that if he was asked the question that he, Hannon, definitely did not answer yes to the Defendant. And he does not know whether Detective Johns told the Defendant it would be helpful if he took a polygraph.

According to the Defendant, he also asked Lloyd White if it would help if he took a polygraph. And White

testified that he did not recall if Defendant asked that question.

I am very uncertain, actually, based on the evidence I have heard, whether or not the Defendant ever asked that question. According to Officer Hannon the Defendant may have asked that question.

But even if he did not ask that question, that failure on his part to ask the question and receive an affirmative response by the police does nothing to assist the State in overcoming their heavy burden of showing a knowing and intelligent waiver, not influenced by Reese's statement.

The polygraph process began at about 8:30 or 9:00 o'clock with Defendant's mother present at the Maryland State Police barracks. She signed a consent form but never saw or spoke to the Defendant. We now have a change of location and the re-Mirandaizing of the Defendant.

However, this is all one continuous course of conduct beginning with Office[r] Reese's statement and other coercive circumstances. Defendant had, as some cases talk about, already let the cat out of the bag. It is unlikely that an honest 17 year old who is respectful of authority would realize he could turn back now.

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to

counsel.

He was thereafter interrogated by police in violation of Miranda and Edwards. The State must prove his subsequent pro forma waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden.

The motion to suppress is therefore granted as to any and all statements Defendant made at the Annapolis police department. And any and all statements that he made at the Maryland State Police barracks.

Is there any further at this time, then?

MR. PAONE: No, Your Honor.

MR. RAVENELL: Nothing from Defense, Your Honor. Thank you.

MR. PAONE: Excuse me, Your Honor. Your Honor, the State would request that the Court make a finding regarding voluntariness of the statement for possible impeachment purposes down the road.

THE COURT: Okay.

MS. ALBAN: To consider it at some point - -.

MR. RAVENELL: Are you asking for that now or later?

MS. ALBAN: No. No. If the Court, I mean, I don't know if the Court is prepared. I mean I understand we can't use the statement now in our case in chief. But, if the Court finds it involuntary, we can't use it for impeachment purposes. If the Court finds that it was voluntary, we may be able to use it for impeachment purposes should the Defendant take the stand.

THE COURT: Okay.

MS. ALBAN: So, prior to the trial date.

THE COURT: Well, just by way of comment, I mean, if you want me to address that in more detail, I will. I felt that that was what I was addressing in the latter part of my opinion.

MS. ALBAN: Okay. I just wanted to clarify.

THE COURT: Where I went from the original Miranda analysis into the whole voluntariness analysis.

MS. ALBAN: Thank you. I just wanted to be crystal clear on that. Thank you.

THE COURT: Okay. You are welcome.

MR. RAVENELL: Thank you, Your Honor.

(Whereupon, the hearing was concluded.)

APPEARANCES (Continued):

FOR THE DEFENDANT:

KENNETH W. RAVENELL, Esq.
Schulman, Treem, Kamikow,
Gilden and Ravenell, P.A.
World Trade Center
401 E. Pratt Street, Suite 1800
Baltimore, Maryland 21202

IVAN JULES BATES, Esq.
724 Reservoir Road
Baltimore, Maryland 21217

INDEX

	Page
General Discussion	4
Opinion by Pamela L. North, Judge	4
Comments by Frederick M. Paone, Esq. Attorney for the State	28
Ruling by Pamela L. North, Judge	29

Keynote: "- - -" indicates inaudible in the transcript.

CERTIFICATE

CompuScribe hereby certifies that the attached pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Anne Arundel County in the matter of:

Criminal Nos. K-2002-01254
K-2002-02417

STATE OF MARYLAND

v.

LEEANDER JEROME BLAKE

By:

Janice T. Warner, Transcriber

(2)

Supreme Court, U.S.
FILED
NOV 17 2004
OFFICE OF THE CLERK

No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

LEEANDER JEROME BLAKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

KENNETH W. RAVENELL
SCHULMAN, TREEM, KAMINKOW,
GILDEN & RAVENELL, P.A.
Attorneys for Respondent
The Baltimore Inner Harbor
World Trade Center
Suite 1800
401 East Pratt Street
Baltimore, MD 21202-3004
(410) 659-0111

190995

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Statement of the Case 1

Reasons for Denying the Petition 7

I. This Honorable Court's Rule in *Edwards* is Clear. 9

II. The *Seibert* Analysis is Unavailing to the Petitioner's Argument. 10

III. There is No Inconsistency in the Lower Courts that Warrant Granting the Petitioner's Writ. 11

IV. Public Policy Concerns Do Not Require this Honorable Court to Grant Certiorari. 12

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Edwards v. Arizona, 451 U.S. 477 (1981) 7, 9, 11, 13

Miranda v. Arizona, 384 U.S. 436 (1966) 1

Missouri v. Seibert, 124 S. Ct. 2601 (2004) 10

Oregon v. Bradshaw, 462 U.S. 1039 (1983) 9

Oregon v. Elstad, 470 U.S. 298 (1985) 12

State v. Plch, 826 A.2d 534 (N.H.), *cert. denied*, 124 S. Ct. 546 (2003) 11, 12

Statutes:

Md. Ann. Code, Cts. & Jud. Proc. § 12-302(c)(3)(iv)(2002) 13

Md. Ann. Code, Cts. & Jud. Proc. § 12-302(c)(3)(v)(2)(A)(2004) 13

STATEMENT OF THE CASE

On September 19, 2002, a murder occurred on Cumberland Court in the historic district of Annapolis, Maryland. (App. 4a). On October 25, 2002, Terrence Tolbert was arrested in connection with the murder. (App. 4a). On the following day, October 26, 2002, at approximately 5:00 a.m., Mr. Blake was arrested at his home at gunpoint. (App. 4a). Mr. Blake, a seventeen year old, was removed from his home wearing underwear and no shoes. (App. 4a). Mr. Blake was transported to the Annapolis Police Department and Detective William Johns advised Mr. Blake of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) at 5:11 a.m. (App. 4a). Mr. Blake indicated that he did not want to talk to the police without an attorney. (App. 4a). Mr. Blake was then placed in a holding cell. (App. 4a).

At 6:00 a.m., Detective Johns went to Mr. Blake's cell accompanied by Officer Curtis Reese. (App. 4a). Detective Johns handed Mr. Blake a copy of his arrest warrant and told him to read the document carefully. The Statement of Charges improperly and incorrectly read in *large print* and *capital letters* that Mr. Blake, a juvenile, faced the *death penalty*. (App. 5a). As Detective Johns turned to leave, Officer Curtis Reese, who had accompanied Detective Johns to Mr. Blake's cell, stated in a loud and confrontational tone, "I bet you want to talk now, huh?" (App. 5a). Detective Johns stated, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now" and pushed Officer Reese out of the cell block. (App. 6a). Detective Johns testified that he was upset, angry and was afraid Officer Reese had violated Mr. Blake's right to counsel. (App. 6a).

Approximately twenty-eight minutes later, after clothing for Mr. Blake arrived at the police department, Detective Johns returned to the holding cell to give Mr. Blake the clothes. (App. 6a). As Detective Johns was about to leave the cell, Mr. Blake said, "I can still talk to you?" (App. 6a). Detective Johns asked Mr. Blake whether he was saying he wanted to talk to Detective Johns and Mr. Blake responded, "Yes." (App. 6a). Mr. Blake was then returned to the interview room, read his rights again and agreed to provide a statement without an attorney. (App. 6a).

Mr. Blake testified that the police officers arrived at his home at 4:30 a.m. while Mr. Blake was watching cartoons. (App. 7a). He was arrested, handcuffed, and taken in his underwear and taken to the police station. (App. 7a) At the police station, after he was advised of his rights, Mr. Blake asked for a lawyer. (App. 7a). He was then placed in a cell and nothing more was said to him until Detective Johns and Officer Reese brought him his charging documents. (App. 7a). At that time, Officer Reese said, "I bet you want to talk now, huh!" (App. 7a). When Mr. Blake was questioned about what caused him to agree to talk to Detective Johns after he had earlier stated he did not want to speak with him, Mr. Blake stated, "first, it was what Officer Reese said to me, 'I bet you want to talk now, huh!' I was scared, cold. Never went through nothing like this. And I saw my charges and I saw I was facing death." (App. 7a-8a).

The following factual findings were made by the suppression court:

> Next question, did Blake invoke his right to counsel? The answer is yes. He requested the presence of an attorney before any questioning could occur.

He signed an advice of rights form at 05:11 hours. At this point, *Miranda* and *Edwards* require that the Defendant be afforded an attorney before any interrogation by the police. (App. 9a).

The Defendant was still in underwear with no shoes on. During this time, the Defendant made no statements and asked no questions. There was, as of this point, no indication the Defendant would change his mind. (App. 8a).

At approximately 6:00am, Detective Johns and Officer Reese, and Officer Reese, by the way, was the same officer who had previously transported the Defendant to the Annapolis Police Department. They both walked back to his cell. As in *Edwards*, Defendant did not request or suggest that the officers should come back to his cell. Defendant was awake. Johns took the statement of charges back to the Defendant, handed them to him, and read the charges to him. Johns testified and this is a quote, "I said to him, they are serious charges. He needs to read it carefully and make sure he understood it." (App. 8a).

As Johns turned to walk out, Reese said in a confrontational loud voice, "I bet you want to talk now, huh!" Johns testified he was surprised by this. (App. 9a).

He also erroneously served him with a document which stated that the penalty for count one murder was death. The word death being written in all capital letters. Defendant was, in fact, not eligible for the

death penalty. This was done intentionally or by mistake . . . No matter who was responsible for death being typed in capital letters on the penalty section for murder, it was still State action. (App. 9a).

So the next question is was there interrogation? Was there a statement made by the police which the police knew or should have known would be reasonably likely to elicit an incriminating response? That answer has to be yes. (App. 9a).

I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement. (App. 9a).

So the question is how do we know what Reese intended. Well, let's analyze the remark he made. Defendant is handed a statement of charges indicating to him, a 17 year old, indicating to him for the first time that he is being charged with murder and he can get the death penalty. (App. 9a-10a).

Reese's statement was, "I'll bet you want to talk now, huh!" This is not a vague appeal to Defendant's conscious like the remarks were in *Brewer versus Williams*. First, the statement itself suggests he should want to talk. And the word, "now," that is, "I'll bet you want to talk now" clearly refers the Defendant to what has just been handed to him. (App. 10a).

It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is in direct response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement. So, until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them. Since 28 minutes had passed, he asked, "I can still talk to you?" Even though that period of time had passed. (App. 10a).

Is there any possible interpretation of that statement that it is, as the State has urged to the Court to find, simply an innocent offhand comment not meant or expected to elicit an incriminating response? I don't think so. Examples of innocent offhand comments not likely to elicit an incriminating response would be "Here are some clothing for you." Or, "Please move away from the door so I can unlock it." Or, "Do you need a drink of water?" (App. 10a-11a).

United States versus Walker instructs courts to look at the context in which the statement is made. Once again, the context is the statement was made to a 17 year old with no Miranda or interrogation experience, who was still in a chilly cell in his underwear with no shoes on, without a parent present or available, just as he is being handed papers advising him he is charged with murder and can get death . . . This statement, under these circumstances, was enough to make an adult repeat offender squirm, not alone a 17 year old. (App. 11a).

The polygraph process began at about 8:30 or 9:00 o'clock with Defendant's mother present at the Maryland State police barracks. She signed a consent form but never saw or spoke to the Defendant. We now have change of location and the re-Mirandizing of the Defendant. (App. 12a).

However, this is all one continuous course of conduct beginning with Officer Reese's statement and other coercive circumstances. Defendant had, as some cases talk about, already let the cat out of the bag. **It is unlikely that an honest 17 year old who is respectful of authority would realize he could turn back now.** (Emphasis added) (App. 12a).

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, when viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to counsel. (Emphasis added) (App. 12a).

He was thereafter interrogated by police in violation of Miranda and Edwards. **The State must prove his subsequent pro forma waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden.** (Emphasis added) (App. 12a).

The Maryland Court of Appeals addressed the Petitioner's writ of certiorari to answer the following question: "Did the police actions in question constitute the functional equivalent of interrogation?" The Maryland Court of Appeals answered that question in the affirmative.

REASONS FOR DENYING THE PETITION

Although the Petitioner has now conceded that Officer Reese's comment was interrogation, the Petitioner now suggests this Honorable Court should address what the Petitioner claims is an entirely different question: When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police? However, a review of the record will demonstrate that the Maryland Court of Appeals squarely addressed this argument, found that a violation can be cured, and then rejected the Petitioner's argument. The Maryland Court of Appeals stated, in pertinent part:

> We agree with Judge North that petitioner did not initiate further contact with the police and the police violated the *Edwards* rule. Although petitioner's question to Detective Johns, "I can still talk to you?" might be considered an "initiation" in the dictionary sense of the word as used in Bradshaw, it could hardly be said that, **under the circumstances**, petitioner initiated contact in the legal sense. Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected. (Emphasis added) (App. 26a).

There was no break in custody or adequate lapse of time sufficient to vitiate the coercive effect of the impermissive interrogation. *See Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988) (holding that break in custody after invocation of Fifth Amendment rights ends the need for the Edwards rule); *United States v. Walker*, 624 F.Supp. 103, 105 (D.Md. 1985) (holding that following defendant's invocation of his Miranda rights, delay of approximately one hour not sufficient to constitute waiver of right to have counsel present before he made any statement. (Emphasis added) (App. 26a).

We reject the State's argument that, even if Officer Reese, interrogated petitioner in violation of *Miranda* and *Edwards*, Detective Johns somehow cured the violation by declaring in a loud voice: "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Judge North's conclusion that Detective Johns' remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous. (Emphasis added) (App. 26a-27a).

The delay of twenty-eight minutes before petitioner asked if he could talk to the officers is insufficient to constitute a waiver of his right to have counsel present before he made any statement. The break in time from Officer Reese's improper interrogation to petitioner's inquiry was very short, indicating that the latter was a continuation of the former. (App. 27a).

The record supports the Circuit Court's finding that petitioner's question was in direct response to Officer Reese's unlawful interrogation and was the product of impermissive interrogation. **Under these circumstances**, we conclude that petitioner did not "initiate" conversation with the police. (Emphasis added) (App. 27a).

I. This Honorable Court's Rule in *Edwards* is Clear.

The Petitioner contends that the Maryland Court applied a "narrow, straightjacket" approach which the Petitioner suggests is somehow "draconian." (Petitioner's Brief pp. 6-7) There is simply no reason, as the Petitioner argues, for this Honorable Court to re-examine *Edwards* and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) to "offer a pragmatic, yet effective prophylactic rule in assessing an alleged *Edwards* violation." (Petitioner's Brief pp. 7-8.) The Maryland Court correctly followed existing case law and made its decision based on the specific factual circumstances present in this case. The Maryland Court did not hold that *Edwards* never permits intervening circumstances to cure a violation of one's right to counsel, but instead held that "**under these circumstances**," there were no intervening circumstances that cured the violation of Mr. Blake's right to counsel before the later interrogation.

The Petitioner argues that a number of factors should have led the Maryland Court to hold that Mr. Blake's initiation of contact was not tainted: Detective Johns properly administered Miranda warnings to Mr. Blake; ceased questioning when Mr. Blake requested an attorney; provided Mr. Blake with a copy of the statement of charges; Mr. Blake said nothing after Officer Reese's comment, Detective Johns shut down any possible conversation; Mr. Blake learned from

the statement of charges that Tolbert was placing the blame on him; Mr. Blake asked to talk to Detective Johns thirty minutes later and Mr. Blake was re-advised of his Miranda warnings. What the Petitioner omits is that it was not just Officer Reese's comment, but the entire set of circumstances, that led the suppression court and Maryland Court of Appeals to rule that the subsequent statement was tainted. In addition to Officer Reese's comment, Mr. Blake was shown a statement of charges which improperly informed him that he was facing the death penalty. Mr. Blake was cold and scared. It was these circumstances, coupled with the fact that only thirty minutes prior, Officer Reese improperly interrogated Mr. Blake that led to the Maryland Court's finding. As the Court of Appeals held, the suppression court's factual findings were not erroneous and should not be disturbed. Based on those factual findings and the application of existing law, the Maryland Court's decision was correct.

II. The *Seibert* Analysis is Unavailing to the Petitioner's Argument.

The Petitioner argues that if this Honorable Court took an approach similar to the one taken in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), the result in Mr. Blake's case would be different. That is not the case.[1] The Petitioner states, "even assuming an impermissible remark by Officer Reese, one must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect . . . It certainly cannot be the case that Officer Reese's comment forever taints a subsequent waiver." (Petitioner's Brief p. 14).

1. Additionally, in *Seibert*, the Supreme Court considered Miranda warnings which is a court created prophylactic rule. In the case at bar, what was at issue was Mr. Blake's constitutionally guaranteed right to counsel.

Mr. Blake agrees that it is NOT the case that Officer Reese's comment forever taints a subsequent waiver. The Maryland Court did not make such a finding. The Maryland Court properly considered Detective Johns alleged curative measures and rejected that argument as did the suppression court. The suppression court had the opportunity to evaluate the witnesses and assess their demeanor. The suppression court was convinced that Mr. Blake was still laboring under the influences of Officer Reese's comments and that based on the **totality of the circumstances**, Mr. Blake's right to counsel was violated. Those factual findings were not erroneous nor was the legal finding by the Maryland Court of Appeals.

III. There is No Inconsistency in the Lower Courts that Warrant Granting the Petitioner's Writ.

The Petitioner also argues that there is an inconsistency among the lower courts in analyzing *Edwards*, citing *State v. Plch*, 826 A.2d 534 (N.H.), *cert. denied*, 124 S. Ct. 546 (2003).

An examination of the *Plch* case demonstrates that the Maryland Court used the same approach but reached a different factual conclusion based on the circumstances in Mr. Blake's case which is the purpose of a state court. The *Plch* court specifically noted that approximately two and a half hours after the improper comments, the defendant (an adult) gave an incriminating statement. The *Plch* court stated, "Given the significant time lapse and the defendant's continued denials, we conclude that the defendant's initiation of dialogue with the police was not prompted by Lieutenant Putney's improper comments." *Id.* at 542. On the other hand, the Maryland Court noted:

> The delay of twenty-eight minutes before petitioner asked if he could talk to the officers is insufficient

> to constitute a waiver of his right to have counsel present before he made any statement. The break in time from Officer Reese's improper interrogation to petitioner's inquiry was very short, indicating that the latter was a continuation of the former. (App. 27a).
>
> The record supports the Circuit Court's finding that petitioner's question was in direct response to Officer Reese's unlawful interrogation and was the product of impermissive interrogation. **Under these circumstances,** we conclude that petitioner did not "initiate" conversation with the police. (Emphasis added) (App. 27a).

What the Petitioner is really suggesting is that because it prefers the result in *Plch* over the result of the Maryland Court, this Honorable Court should grant certiorari in this case. Even if there is an inconsistency among the lower courts, the Maryland courts have applied the *Elstad*-type analysis, articulated in *Oregon v. Elstad*, 470 U.S. 298 (1985), advocated by the Petitioner and properly rejected the Petitioner's argument.

IV. Public Policy Concerns Do Not Require this Honorable Court to Grant Certiorari.

Finally, the Petitioner argues that public policy concerns require that this Honorable Court grant certiorari. The Petitioner classifies Officer Reese's remark as "offhand" and states that the Constitution was not designed to "set the guilty free." (Petitioner's Brief p. 19). First, there is no evidence that Officer Reese's remark was "offhand." In fact, the suppression court specifically noted that Officer Reese's remark was intended to elicit an incriminating response. (App. 9a). The Petitioner also makes reference to the fact that by ordering suppression of the statement, the trial court has "under state law, allowed Blake to

go free." (Petitioner's Brief p. 8). The law to which the Petitioner refers, *Md. Ann. Code, Cts. & Jud. Proc.* § 12-302(c)(3)(iv) (2002) was changed by the Maryland legislature last term.[2] Lastly, there is also no evidence that Mr. Blake is guilty of the crime with which he is charged. The Maryland Court has properly addressed and rejected the Petitioner's arguments presented here.

CONCLUSION

Because the factual finding in this case was not clearly erroneous and that there is no confusion regarding the application of *Edwards*, Mr. Blake respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

KENNETH W. RAVENELL
SCHULMAN, TREEM, KAMINKOW,
GILDEN & RAVENELL, P.A.
Attorneys for Respondent
The Baltimore Inner Harbor
World Trade Center
Suite 1800
401 East Pratt Street
Baltimore, MD 21202-3004
(410) 659-0111

---

2. The 2002 statute provided that if the State appealed the granting of a motion to suppress, a defendant would be released pending the outcome of the appeal. *Md. Ann. Code, Cts. & Jud. Proc.* § 12-302(c)(3)(v)(2)(A) (2004) now provides that if the defendant is charged with a crime of violence, the court may order the defendant remanded to custody pending the outcome of the appeal.

JUN 9 2005

No. 04-373

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

LEEANDER JEROME BLAKE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JOHN P. ELWOOD
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under *Edwards* v. *Arizona*, 451 U.S. 477 (1981), after a suspect has invoked his right to have counsel present during custodial interrogation and a police officer engages in improper communications with the suspect, curative measures and intervening circumstances may enable the suspect validly to reinitiate dialogue about the investigation and agree to waive his rights.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	7
Argument:	10
Curative police measures neutralized the effect of one officer's improper communications with respondent after his invocation of the right to have counsel present at questioning	10
A. *Edwards* v. *Arizona* creates a prophylactic rule to protect against police badgering of a suspect who has asserted his rights	10
B. Curative measures can dissipate the effects of improper questioning after a suspect asserts the right to counsel	12
1. Courts have recognized that intervening circumstances can minimize the risk that *Edwards* was designed to address	13
2. Curative measures can neutralize the potential harms of improper questioning following an invocation of the right to counsel	15
3. This Court's decisions support the conclusion that curative measures can vitiate the *Edwards* presumption of coercion	17
4. The broad attenuation analysis used in Fourth Amendment cases is not warranted in the *Edwards* context	20
C. A rule that improper police comments cannot be cured absent a break in custody or a lapse in time would impose unjustified costs on the criminal justice system	24

Table of Contents—Continued: Page

D. Detective Johns's statements dissipated the effects of post-invocation questioning 26

Conclusion 30

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 17
Arizona v. *Roberson*, 486 U.S. 675 (1988) 11, 12, 15, 16
Berkemer v. *McCarty*, 468 U.S. 420 (1984) 25
Brown v. *Illinois*, 422 U.S. 590 (1975) 20, 21, 22
Butzin v. *Wood*, 886 F.2d 1016 (8th Cir. 1989), cert. denied, 496 U.S. 909 (1990) 14
Chavez v. *Martinez*, 538 U.S. 760 (2003) 22
Colorado v. *Connelly*, 479 U.S. 157 (1986) 17
Connecticut v. *Barrett*, 479 U.S. 523 (1987) 12
Davis v. *United States*, 512 U.S. 452 (1994) 10
Dickerson v. *United States*, 530 U.S. 428 (2000) 10, 25
Dunkins v. *Thigpen*, 854 F.2d 394 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989) 14, 15
Edwards v. *Arizona*, 451 U.S. 477 (1981) 1, 4, 7, 10, 11, 17, 24, 28
Harris v. *New York*, 401 U.S. 222 (1971) 25
Hill v. *Brigano*, 199 F.3d 833 (6th Cir. 1999), cert. denied, 529 U.S. 1134 (2000) 14
Holman v. *Kemna*, 212 F.3d 413 (8th Cir.), cert. denied, 531 U.S. 1021 (2000) 15
Lyons v. *Oklahoma*, 322 U.S. 596 (1944) 17
McFadden v. *Garraghty*, 820 F.2d 654 (4th Cir. 1987) 14
McNeil v. *Wisconsin*, 501 U.S. 171 (1991) 10, 13, 23, 24, 30
Michigan v. *Harvey*, 494 U.S. 344 (1990) 11
Michigan v. *Mosley*, 423 U.S. 96 (1975) 24
Michigan v. *Tucker*, 417 U.S. 433 (1974) 23
Minnick v. *Mississippi*, 498 U.S. 146 (1990) 11, 15

Cases—Continued: Page

Miranda v. *Arizona*, 384 U.S. 436 (1966) 2, 7, 10, 11, 12
Missouri v. *Siebert*, 124 S. Ct. 2601 (2004) ..... *passim*
Moran v. *Burbine*, 475 U.S. 412 (1986) 23
New York v. *Quarles*, 467 U.S. 649 (1984) 10, 24
Nix v. *Williams*, 467 U.S. 431 (1984) 26
Oregon v. *Bradshaw*, 462 U.S. 1039 (1983) 7, 11, 13, 17
Oregon v. *Elstad*, 470 U.S. 298 (1985) ..... *passim*
Oregon v. *Hass*, 420 U.S. 714 (1975) 25, 26
Patterson v. *Illinois*, 487 U.S. 285 (1988) 11
Rhode Island v. *Innis*, 446 U.S. 291 (1980) 27
Smith v. *Illinois*, 469 U.S. 91 (1984) 13
Taylor v. *Alabama*, 457 U.S. 687 (1982) 21
Texas v. *Cobb*, 532 U.S. 162 (2001) 23
Tukes v. *Dugger*, 911 F.2d 508 (11th Cir. 1990), cert. denied, 502 U.S. 898 (1991) 28
United States v. *Barlow*, 41 F.3d 935 (5th Cir. 1994), cert. denied, 514 U.S. 1030 (1995) 14, 15
United States v. *Bautista*, 145 F.3d 1140 (10th Cir.), cert. denied, 525 U.S. 911 (1998) 14, 28
United States v. *Bayer*, 331 U.S. 532 (1947) 24
United States v. *Ceccolini*, 435 U.S. 268 (1978) 24
United States ex rel. Espinoza v. *Fairman*, 813 F.2d 117 (7th Cir.), cert. denied, 483 U.S. 1010 (1987), overruled on other grounds by *United States* v. *LaGrone*, 43 F.3d 332 (7th Cir. 1994) 14
United States v. *Gomez*, 927 F.2d 1530 (11th Cir. 1991) 7, 12, 14
United States v. *Harris*, 221 F.3d 1048 (8th Cir. 2000) 14
United States v. *Patane*, 124 S. Ct. 2620 (2004) 24
United States v. *Skinner*, 667 F.2d 1306 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983) 14

Cases—Continued: Page

United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 21
Wong Sun v. *United States*, 371 U.S. 471 (1963) 18, 20

Constitution, statutes and rules:

U.S. Const.:
Amend. IV 20, 21, 22, 23
Amend. V 7, 10, 17, 21, 22
42 U.S.C. 1983 22
Md. Code Ann., Crim. Law § 2-202(b)2)(i) (Michie 2002) 3
Fed. R. Crim. P.:
Rule 4, advisory committee notes to 2002 amendments 27
Rule 4(c)(3)(A) 27
Rule 9(c)(1)(A) 27
Md. R. 4-212(e) 2, 27

In the Supreme Court of the United States

No. 04-373

STATE OF MARYLAND, PETITIONER

v.

LEEANDER JEROME BLAKE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether *Edwards* v. *Arizona*, 451 U.S. 477 (1981), permits courts to consider whether curative measures and intervening circumstances can neutralize the effect of a police officer's improper communications with a suspect after the suspect's invocation of the right to have counsel present at questioning. Because of its role in the investigation and prosecution of federal crimes, the United States has a substantial interest in that issue. In particular, the government has an interest in an interpretation of *Edwards* that allows consideration of curative measures, such that a suspect who has once invoked his right to counsel may validly re-initiate communication with law-enforcement agents, and make statements that can be admitted into evidence, even if agents previously made comments that are construed as improper interrogation.

STATEMENT

1. On September 19, 2002, Straughan Lee Griffin, a resident of Annapolis, Maryland, was shot and killed in front of his house. Pet. App. 3a. On October 25, 2002, Terrence Tolbert, who had been arrested in connection with Griffin's

murder, implicated respondent in the crime. That day, police obtained an arrest warrant for respondent and a warrant to search his house. Before executing the warrants, Sergeant Gregory Kirchner instructed the officers not to speak to respondent. J.A. 238. Between 4:30 and 5:00 a.m. the next morning, Anne Arundel County police arrested respondent at his home, handcuffed him, and transported him to the Annapolis Police Department. At the time, respondent was wearing only a tank top and boxer shorts with no shoes. Pet. App. 4a.

In the "intake" or "booking" room of the station house, Detective William Johns, the lead detective investigating the Griffin murder, advised petitioner of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Petitioner invoked his right to counsel, stating that he did not wish to speak with the police officers without an attorney. After respondent signed an advice-of-rights form, the police placed him in a holding cell. Pet. App. 4a.

About 35 minutes later, at 6 a.m., Detective Johns, accompanied by Officer Curtis Reese, went to respondent's cell and handed him a copy of the arrest warrant and statement of charges, as they were required to do under Maryland law. See Md. R. 4-212(e) (providing that "the officer shall inform the defendant of the nature of the offense charged" and "[a] copy of the warrant and charging document shall be served on the defendant"). Detective Johns explained the charges to respondent, told him that they were serious charges, and said that respondent should read the document carefully and make sure he understood it. Pet. App. 4a-5a.

The statement of charges that Detective Johns handed to respondent consisted of a District Court of Maryland computer printout. The document indicated that petitioner was charged with first-degree murder, second-degree murder, armed robbery, armed carjacking, and using a handgun in a crime of violence. The computer-generated document listed the generally applicable maximum penalties for each offense.

Pet. App. 39a, 49a. The document stated that the maximum penalty for first degree murder is "DEATH." While that was a correct statement of the statutory maximum penalty for that offense, respondent was not eligible for the death penalty under Maryland law because he was under the age of 18 at the time of the offense. Pet. App. 5a. See generally Md. Code Ann., Crim. Law § 2-202(b)(2)(i) (Michie 2002).

After Detective Johns handed the charging document to respondent and turned to leave, Officer Reese stated to respondent, in a tone that Detective Johns later characterized as loud and confrontational, "I bet you want to talk now, huh!" Detective Johns was surprised by the statement, and he "pushed/escorted" Officer Reese out of the cell, stating very loudly within respondent's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Pet. App. 6a, 71a. Detective Johns testified that he made the statement because he was concerned that "Officer Reese's outburst would violate [respondent's] request for counsel prior to being questioned." Respondent said nothing at the time. *Id.* at 5a-6a.

Petitioner remained in his cell, wearing the clothes he had on at the time of his arrest. Approximately 30 minutes after the earlier encounter, Detective Johns returned to the cell to give respondent clothing that had been brought from respondent's home. After Detective Johns handed respondent his clothing, respondent asked, "I can still talk to you?" Detective Johns responded, "Are you saying that you want to talk to me now?" Petitioner answered, "Yes." Detective Johns left the cell area and returned after a few minutes. He then brought respondent to the intake room and re-administered *Miranda* warnings. Respondent waived his rights and made incriminating statements to Detective Johns concerning his involvement in the Griffin murder. In response to a request from Detective Johns, respondent agreed to take a polygraph examination. Officers transported respondent to a State Police barracks in Annapolis, where he was

again advised of his *Miranda* rights. Following the polygraph, respondent made additional statements. Pet. App. 6a-7a.

2. A state grand jury indicted respondent for first-degree murder, second-degree murder, and manslaughter. Before trial, respondent moved to suppress his statements, arguing that Officer Reese's comment to him violated the rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which holds that statements obtained by police during custodial interrogation are not admissible once a suspect has invoked his right to counsel, unless the suspect initiates communication with police. After an evidentiary hearing, the trial court granted respondent's motion. Pet. App. 59a-85a.

The court ruled that Officer Reese's statement to respondent constituted interrogation for purposes of the *Edwards* rule (Pet. App. 72a, 76a), finding that the statement was "made specifically for the purpose of getting [respondent] to talk," *id.* at 75a. The court observed, however, that Detective Johns's act of handing respondent the charging document "does not amount to interrogation and is part of a lawful booking process." *Id.* at 76a. In addition, the court found that the boilerplate recitation of maximum penalties in the charging document, which incorrectly suggested that respondent was eligible for the death penalty, had been "done by mistake," not intentionally. *Id.* at 72a.

The court concluded that respondent's later request to speak to Johns was "in direct response to Reese's previous statement." Pet. App. 75a. The court viewed respondent's agreement to take a polygraph exam as part of "one continuous course of conduct beginning with Officer Reese's statement" (*id.* at 82a), adding that "[t]here was no lengthy period of time * * * to break the chain of events and to prove attenuation." *Ibid.* Although the court acknowledged that respondent had testified that he was motivated to speak after he had read the charging papers and learned that Tolbert had blamed the murder on him and "he wanted the police to

know the truth," *id.* at 81a, the court said that "[t]he State has not met its heavy burden of proving a voluntary, knowing and intelligent waiver or showing that [respondent] was not still suffering under the impact of Reese's unlawful course of interrogation." *Ibid.* The court rejected the State's argument that the immediate curative action taken by Detective Johns negated any intent to elicit statements from respondent. *Id.* at 73a-74a.

3. A divided panel of the Court of Special Appeals of Maryland reversed, concluding that Officer Reese's statement to respondent did not qualify as interrogation for purposes of the *Edwards* rule. Pet. App. 30a-58a. The majority concluded that Officer Reese's "blurt[ed]" statement was "rhetorical in nature," *id.* at 52a, and that it did not suggest "that [respondent] was * * * expected to respond, and he did not respond." *Ibid.* The majority emphasized that respondent "was not 'badgered' or subjected to 'compelling influences' or 'psychological ploys.'" *Ibid.* The dissenting judge concluded that "Officer Reese should have known that his statement * * * was reasonably likely to elicit an incriminating response." *Id.* at 58a.

4. The Court of Appeals of Maryland granted respondent's petition for a writ of certiorari, reversed the judgment of the intermediate appellate court, and reinstated the suppression order. Pet. App. 1a-29a.

The court first held that Officer Reese's statement amounted to "the functional equivalent of interrogation." Pet. App. 20a. The court acknowledged that the act of merely serving the charging document, with its inaccurate suggestion that respondent was subject to the death penalty, did not constitute interrogation. *Id.* at 22a. But in light of the almost simultaneous service of the document, "any reasonable officer had to know that [Officer Reese's] comment was reasonably likely to elicit an incriminating response." *Id.* at 21a.

The court rejected the State's argument that, even if Officer Reese's statement constituted interrogation, *Edwards* did not bar admission of his statements because it was respondent who reinitiated communication by asking to speak with Detective Johns. The court stated that, although respondent's request to speak may have constituted "initiation" in the "'dictionary sense' of the word," there was no initiation by respondent "as that term is contemplated in the legal sense." Pet. App. 26a. In reaching that conclusion, the court considered the following factors:

> Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected.

Ibid.

The court also rejected the State's argument that Detective Johns neutralized the effect of Officer Reese's comment by saying that police could not talk to respondent in light of his invocation of the right to counsel, stating only that the trial court's conclusion that Johns's comment did not negate the violation was "not clearly erroneous." Pet. App. 27a. The court emphasized that "[t]he delay of twenty-eight minutes" between Officer Reese's comment and respondent's inquiry about speaking with police was "insufficient to constitute a waiver of his right to have counsel present." *Ibid.* The court suggested that, "once the police violate *Edwards*, it does not make sense to say that an accused can thereafter 'initiate' conversation with the police unless a substantial amount of time has elapsed such that 'the coercive effect of the interrogation has subsided.'" *Id.* at 28a (quoting *United States* v. *Gomez*, 927 F.2d 1530, 1539 n.8 (11th Cir. 1991)).

The court stated that, "[a]lthough the accused technically may begin a conversation with the police, if this occurs after the police have interrogated the accused in violation of *Edwards*, the voluntariness of such 'initiation' is suspect and statements subsequently obtained are inadmissible." *Ibid.* (citing *Gomez*, 927 F.2d at 1539).

SUMMARY OF ARGUMENT

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court adopted, as a prophylactic measure to protect Fifth Amendment rights, the rule that in order for a suspect to give an admissible statement during custodial interrogation, he must generally first be advised of specified rights and voluntarily agree to waive them. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court built on its *Miranda* jurisprudence by holding that, when a suspect has been advised of his right to have counsel present during custodial interrogation and invokes that right, statements made in response to further police questioning of an uncounseled suspect must be excluded, even if the defendant has received fresh *Miranda* warnings and voluntarily waived his rights. *Edwards* establishes an "anti-badgering" rule on the premise that, once a defendant has evinced an unwillingness to deal with custodial interrogation without counsel's assistance, further police efforts to induce him to waive his rights pose an undue risk that a decision to speak without counsel will not be a product of free choice. The *Edwards* rule, however, does not prelude a suspect from himself choosing to re-initiate dialogue with the authorities and then validly waiving his rights. To the contrary, *Edwards* respects the principle that an informed defendant has free choice to elect to reopen communications with the police without counsel. *Id.* at 485; *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion).

The Court of Appeals of Maryland held below that, once a police officer improperly questions a suspect who has asserted his *Miranda* right to counsel, any later effort by the

suspect to re-establish communications with the police and waive his rights must be deemed invalid unless there has been a break in custody or a substantial lapse of time. The court of appeals erred in adding a new presumption to *Edwards* that frustrates a suspect's voluntary desire to communicate with the authorities. In a case where intervening circumstances or curative measures have neutralized the impact of improper questioning, there should be no per se rule that a break in custody or a substantial lapse of time must occur before a suspect may validly reinitiate communications with police.

Edwards's concern is that a defendant who expresses the desire to deal with the police through counsel may be unable to resist further entreaties to talk. After improper questioning, such a defendant might find fresh *Miranda* warnings alone insufficient reassurance, because the police have already failed to respect his assertion of the right to have counsel present. But when one officer asks an improper question and another officer promptly applies an effective curative measure—such as reiterating that respondent's invocation of the right to counsel means that he cannot be questioned—there is no reason to reject a suspect's later initiation of communications with the police on the basis of a conclusive presumption of involuntariness.

Allowing curative measures to restore a suspect's ability to reinitiate communications would not invite abuses by the authorities. Curative measures could not retroactively render admissible any earlier, improperly elicited statements. Nor would curative measures alter the government's burden to show a re-initiation of communications and a voluntary and intelligent waiver of rights. And there is no significant danger that recognizing curative measures would encourage intentional strategies by the police to circumvent *Edwards*, because officers could not control whether a suspect would voluntarily choose to reopen dialogue with the police, and the authorities would have much to lose if improper ques-

tioning were held to render *all* subsequent communications with the suspect involuntary. Recognizing the ability of intervening circumstances or curative measures to neutralize improper questioning would render the law under *Edwards* consistent with this Court's approach to parallel issues under *Miranda* itself. See *Oregon* v. *Elstad*, 470 U.S. 298 (1985); *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004).

Under a proper analysis, and freed from the court of appeals' conclusive presumption that a break in custody or a substantial lapse in time is necessary to dissipate the effects of improper questioning, the facts of this case illustrate that adequate curative measures can effectively enable a defendant to exercise free choice in reinitiating dialogue with the authorities. After Officer Reese made a single statement to respondent that the court of appeals construed as interrogation, Detective Johns—the lead investigator—immediately silenced Reese, ushered him from respondent's cell, and loudly reaffirmed that respondent did not want to speak to the police, that he had asked for counsel, and that "[w]e cannot talk to him now." Pet. App. 6a. That information notified respondent that he was not required to speak and reassured him that the police would respect his assertion of the right to counsel. Twenty-eight minutes later—without any police prompting, and without having provided any information to the police—respondent, having read the charges against him, asked whether he could still talk to the police. Nothing in *Edwards* precludes giving effect to respondent's choice at that time. A suspect's voluntary decision to reopen dialogue and his subsequent voluntary waiver of rights should be respected, without applying any further prophylactic presumptions that would frustrate his free will and discredit the voluntary nature of his statements.

ARGUMENT

CURATIVE POLICE MEASURES NEUTRALIZED THE EFFECT OF ONE OFFICER'S IMPROPER COMMUNICATIONS WITH RESPONDENT AFTER HIS INVOCATION OF THE RIGHT TO HAVE COUNSEL PRESENT AT QUESTIONING

A. *Edwards* v. *Arizona* Creates A Prophylactic Rule To Protect Against Police Badgering Of A Suspect Who Has Asserted His Rights

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held that statements made by a defendant in response to custodial interrogation are not generally admissible against him in the government's case in chief unless the defendant voluntarily and knowingly agreed to speak after the administration of specified warnings. Specifically, the suspect must "be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him, and that he has a right to the presence of an attorney" during custodial questioning. *Id.* at 444. The *Miranda* rule is a "prophylactic" measure. See, *e.g.*, *New York* v. *Quarles*, 467 U.S. 649, 653 (1984). The premise of *Miranda* is that custodial interrogations "contain[] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. The rule is designed to protect the Fifth Amendment privilege by reducing the "risk of overlooking an involuntary custodial confession" under the "traditional totality-of-the-circumstances test." *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000).

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court created a "second layer of prophylaxis" for the *Miranda* right to counsel. *Davis* v. *United States*, 512 U.S. 452, 458 (1994) (quoting *McNeil* v. *Wisconsin*, 501 U.S. 171, 176 (1991)). *Edwards* addresses situations in which a suspect requests counsel after *Miranda* warnings have been given. To

protect the assertion of that right, under *Edwards*, once a defendant invokes his right to counsel, statements made during government-initiated custodial interrogation of an uncounseled suspect are barred from the government's case in chief, even if the defendant receives and voluntarily waives his *Miranda* rights. 451 U.S. at 484, 487; see *Minnick* v. *Mississippi*, 498 U.S. 146 (1990). As the Court has explained, the *Edwards* rule "presume[s]" that "if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then * * * any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Arizona* v. *Roberson*, 486 U.S. 675, 681 (1988) (quoting *Miranda*, 384 U.S. at 467). *Edwards* thus protects against police "badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick*, 498 U.S. at 150 (quoting *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990)).

Edwards itself makes clear, however, that no absolute presumption of coercion is warranted following a suspect's invocation of his right to counsel, and further interrogation is permissible, if "the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 485; accord *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1043-1044 (1983) (plurality opinion). *Edwards* thus allows a defendant to make a voluntary decision to change his mind, after the assertion of the right to counsel, and to approach officers to discuss the investigation. That rule respects the principle that is at the heart of *Miranda* and *Edwards*: the right of a suspect who is informed of his rights to make a decision for himself whether to "face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) ("Preserving the integrity of an accused's choice * * * is the essence of *Edwards*."); *Minnick*, 498 U.S. at 153 (stating that the purpose

of the *Edwards* rule is to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel"); *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987) ("The fundamental purpose of the Court's decision in *Miranda* was 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.") (quoting *Miranda*, 384 U.S. at 469).

B. Curative Measures Can Dissipate The Effects Of Improper Questioning After A Suspect Asserts The Right To Counsel

The Court of Appeals of Maryland concluded that, if a police officer makes a comment that qualifies as interrogation after the suspect has invoked his *Miranda* right to counsel, a suspect cannot be deemed to have initiated any subsequent communication unless there "was [a] break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive [*sic*] interrogation." Pet. App. 26a; see also *id.* at 28a (accused cannot be deemed to have initiated subsequent conversation "unless a substantial amount of time has elapsed"). Although recognizing that "the accused *technically* may begin a conversation with police," *ibid.* (emphasis added), the court concluded that, "in the legal sense," *id.* at 26a, the statements must be deemed a continuation of earlier interrogation because of "the coercive effect of the interrogation." *Id.* at 28a (quoting *United States* v. *Gomez*, 927 F.2d 1530, 1539 n.8 (11th Cir. 1991)). In doing so, the court essentially extended *Edwards*'s presumption of coercion to include not just statements made "at the authorities' behest" after the suspect invokes his right to the presence of counsel at questioning, *Roberson*, 486 U.S. at 681, but also statements made "at the suspect's own instigation" after improper police questioning. *Ibid.*

That conclusion was error. Because curative efforts by police and intervening circumstances can dissipate the effects of "interrogation," there is no basis for conclusively

presuming that a suspect's decision to initiate dialogue with the police and his ensuing statements are the product of coercion. The court below appeared to concede as much by recognizing that a lengthy lapse of time or break in custody could have a curative effect. There is no reason that curative measures by the police that more directly address the effects of post-invocation questioning cannot have a similar effect. In this case, Detective Johns's actions dissipated the risk that respondent would be "badgered" into making statements, and "allow[ed] [respondent] a real choice between talking and remaining silent." *Missouri* v. *Siebert*, 124 S. Ct. 2601, 2608 (2004) (plurality opinion). Accordingly, voluntary statements that respondent subsequently made are admissible.

1. Courts have recognized that intervening circumstances can minimize the risks that *Edwards* was designed to address

The *Edwards* rule addresses the risk that police through "'badger[ing]' or 'overreaching' * * * might * * * wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (per curiam); *id.* at 99 n.8 ("It was precisely such 'badger[ing] that the *Edwards* safeguard was designed to prevent."); *Bradshaw*, 462 U.S. at 1044 (plurality opinion) (stating that the *Edwards* rule is "designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was"). But this Court has noted that the *Edwards* presumption of coercion does not apply in situations in which the risk of police badgering is not significant. In *McNeil*, 501 U.S. at 177, the Court indicated that statements need not be "presumed involuntary and therefore inadmissible as substantive evidence at trial" under *Edwards* where there was a "break in custody" between the suspect's invocation of the right to counsel and subsequent interroga-

tion. Based on *McNeil*, the federal courts of appeals that have addressed the question uniformly have held that *Edwards* does not require a presumption of coercion where post-invocation interrogation occurs after a break in custody, even in cases in which the suspect's interrogation began immediately after he invoked his right to counsel.[1] Similarly, the federal courts of appeals that have addressed the issue have concluded, consistent with the court below, that a significant lapse of time between initial post-invocation interrogation and a suspect's later initiation of communications with the police supports the conclusion that coercion should not be presumed and that statements may be found admissible.[2]

The *Edwards* presumption of coercion is inapplicable under those circumstances because they operate to diminish "the inherently coercive nature of custody itself," and "there is little to no risk of badgering by the authorities." *United States* v. *Bautista*, 145 F.3d 1140, 1150 (10th Cir.), cert. denied, 525 U.S. 911 (1998); *United States* v. *Harris*, 221 F.3d 1048, 1052 (8th Cir. 2000) ("Concern that a suspect will be 'badgered' * * * is not present * * * where a person is

[1] See, *e.g.*, *McFadden* v. *Garraghty*, 820 F.2d 654, 661 (4th Cir. 1987); *United States* v. *Barlow*, 41 F.3d 935, 945 & n.35 (5th Cir. 1994), cert. denied, 514 U.S. 1030 (1995); *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 125 (7th Cir.), cert. denied, 483 U.S. 1010 (1987), overruled on other grounds by *United States* v. *LaGrone*, 43 F.3d 332 (7th Cir. 1994); *United States* v. *Harris*, 221 F.3d 1048, 1052 (8th Cir. 2000) (collecting cases); *United States* v. *Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983); *United States* v. *Bautista*, 145 F.3d 1140, 1150 (10th Cir.), cert. denied, 525 U.S. 911 (1998); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989).

[2] See *Hill* v. *Brigano*, 199 F.3d 833, 842 (6th Cir. 1999), cert. denied, 529 U.S. 1134 (2000); see also *Gomez*, 927 F.2d at 1539 n.8 (suggesting that "[i]t may be possible for enough time to elapse between the impermissible further interrogation and the 'initiation' that the coercive effect of the interrogation will have subsided"); *Butzin* v. *Wood*, 886 F.2d 1016, 1018 (8th Cir. 1989) (concluding that defendant's confession was not the product of previous day's interrogation where the defendant renewed contact following a night in jail and defendant was not under great pressure from authorities to speak), cert. denied, 496 U.S. 909 (1990).

not in continuous custody and the coercive effects of confinement dissolve."); *United States* v. *Barlow*, 41 F.3d 935, 945-946 & n.35 (5th Cir. 1994) (same), cert. denied, 514 U.S. 1030 (1995); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988) (same), cert. denied, 489 U.S. 1059 (1989). The Court of Appeals of Maryland itself acknowledged that a "break in custody or adequate lapse in time" could "vitiate the coercive effect" of post-invocation custodial interrogation. Pet. App. 26a (citing *Dunkins*).

There is no reason why a break in custody or a lapse in time should exhaust "[the] scenarios [that] may * * * militate against the finding of an *Edwards* violation." *Holman* v. *Kemna*, 212 F.3d 413, 419 (8th Cir.), cert. denied, 531 U.S. 1021 (2000). Other circumstances may reduce the risk of badgering sufficiently that no presumption of coercion is justified. See *ibid.* And curative measures that reinforce the message that a suspect's invocation of the right to counsel will be honored, notwithstanding a prior improper comment, fall precisely into the category of actions that justify permitting a suspect validly to reinitiate dialogue with the police on the subject of the investigation.

2. Curative measures can neutralize the potential harms of improper questioning following an invocation of the right to counsel

The effectiveness of a post-interrogation curative statement must be judged in relation to the harms post-invocation interrogation might cause. When a law enforcement officer interrogates a suspect despite his invocation of his right to the presence of counsel at questioning, the suspect may assume that, despite the *Miranda* warnings, the right to counsel does not apply under those circumstances or at least that the police have no intention of respecting it. The *Edwards* rule thus assures "that any statement made in subsequent interrogation [was] not the result of coercive pressures." *Minnick*, 498 U.S. at 151; see *Roberson*, 486 U.S. at 686

("[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling.").

A curative statement by police may effectively address the harms caused by non-coercive post-invocation interrogation by reassuring the suspect that police will honor his right not to speak without the presence of counsel. A simple re-administering of *Miranda* warnings might be insufficient, because the suspect, having already been subjected to interrogation despite the warnings and despite his invocation of counsel, would not necessarily credit new warnings as giving him a true choice to discontinue questioning or believe that police would subsequently honor his wish to speak to them only with the assistance of counsel. Cf. *Roberson*, 486 U.S. at 686 (finding fresh *Miranda* warnings inadequate to dispel *Edwards* presumption of coercion with respect to police-initiated questioning on a separate investigation). Rather, an adequate curative measure would have to convey the message that there would be no further police-initiated questioning without counsel while the suspect remained in custody. Such a measure would justify allowing the suspect to exercise free choice on whether or not to initiate contact with the police, and, if he does so, to allow courts to find a valid waiver of *Miranda* rights based on the usual totality-of-the-circumstances test, free from a conclusive presumption that the waiver is ineffective.

Curative measures, of course, would not retroactively render admissible statements made in response to post-invocation interrogation before curative steps were taken. In addition, curative measures would not relieve the government of the burden of establishing that the curative measures were sufficient, that the suspect initiated dialogue with the police, and that he knowingly, voluntarily, and intelligently waived his *Miranda* right to counsel in custodial interrogation. *Bradshaw*, 462 U.S. at 1044 (plurality opinion); *Edwards*, 451 U.S. at 468 n.9; cf. *Colorado* v. *Connelly*, 479 US. 157, 168-169 (1986) (burden is on prosecution to show waiver by a preponderance of the evidence).[3] And where the initial interrogation was actually coercive in the due process sense, see *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), the government would bear the burden of showing that the suspect did not speak because of "the continuing effect of the coercive practices." *Lyons* v. *Oklahoma*, 322 U.S. 596, 602 (1944). Such protections are adequate to safeguard the underlying Fifth Amendment right, without imposing a per se rule requiring a break in custody or a significant lapse of time before a suspect may validly initiate dialogue with the police following a breach of the prophylactic *Edwards* rule.

3. This Court's decisions support the conclusion that curative measures can vitiate the *Edwards* presumption of coercion

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court confronted an analogous claim that a suspect's giving of an initial statement without *Miranda* warnings tainted his later provision of a second statement after he received *Miranda* warnings and waived his rights. There, the police first elic-

---

[3] The court of appeals apparently erred by combining the inquiry whether a suspect "initiated" communication with the ultimate inquiry whether the waiver of *Miranda* rights was voluntary. In considering whether respondent initiated conversation, the court of appeals weighed several factors that, while relevant to the ultimate issue of the voluntariness of statements, are not relevant to determining whether the suspect "initiated" communication. See Pet. App. 26a (considering, among other factors, the fact that respondent "was seventeen years of age [and] he was in a cold holding cell with little clothing" in determining that he had not "initiated the contact as that term is contemplated in the legal sense"). The court erred by "melding [initiation and voluntariness] together." *Bradshaw*, 462 U.S. at 1045 ("[T]he Oregon Court of Appeals was wrong in thinking that an 'initiation' of a conversation or discussion by an accused * * * sufficed to show a waiver of the previously asserted right to counsel. The inquiries are separate.").

ited an incriminating statement from the defendant without administering *Miranda* warnings. One hour later, the same officer who had taken the earlier statement administered the warnings, and Elstad waived his rights and made additional incriminating statements. Although the period between the two statements was short and there was no change of personnel or significant intervening circumstance, the Court held that the provision of *Miranda* warnings meant that courts should no longer "presume the privilege against compulsory self-incrimination ha[d] not been intelligently exercised." *Id.* at 310. The Court explained that, "absent deliberately coercive or improper tactics in obtaining the initial statement,"

> a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'

Id. at 310-311 (quoting *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963)); see also *id.* at 314 (a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded the admission of the earlier statement").

Just as the provision of *Miranda* warnings in *Elstad* served to vitiate the "presum[ption]" of compulsion in the initial unwarned questioning, 470 U.S. at 310, and thereby permitted the suspect validly to choose to speak to the police, *id.* at 314, so too an effective curative statement can serve to neutralize any presumption of coercion and permit the suspect to reinitiate dialogue with the police and validly waive his rights. A curative statement to a suspect that his right to counsel will be honored and that there will be no further questioning in the absence of counsel neutralizes the

continuing impact of post-invocation police-initiated questioning. As in *Elstad*, once a suspect is assured that he will not be subjected to further police-initiated interrogation in the absence of counsel, "the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Id.* at 308.

The Court's recent decision in *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004), is likewise consistent with this approach. In *Seibert*, a police officer employed a two-step questioning procedure under which he intentionally withheld *Miranda* warnings, obtained a confession, and then, with the confession in hand, went over the same ground with the suspect after administering the warnings. The intentional strategy in that case was based "on the assumption that *Miranda* warnings will tend to mean less when recited mid-interrogation, after inculpatory statements have already been obtained." *Id.* at 2615 (Kennedy, J., concurring in the judgment). The plurality and Justice Kennedy concluded that, under the circumstances, the post-warning confession was inadmissible. *Id.* at 2613 (plurality opinion); *id.* at 2616 (Kennedy, J., concurring in the judgment)). But a majority of the Court reaffirmed the general validity of the *Elstad* approach, *id.* at 2616 (Kennedy, J., concurring in the judgment); *id.* at 2619 (O'Connor, J., dissenting), and several Justices suggested (or explicitly stated) that even intentional two-step questioning would not render later warned statements inadmissible if police made curative statements to reduce the effect of previous unwarned interrogation on the suspect. See *id.* at 2613 (plurality opinion) (emphasizing that "[n]othing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after" interrogation); *id.* at 2615-2616 (Kennedy, J., concurring in the judgment) (stating that "curative steps" such as a "warning that explains the likely inadmissibility of [a] prewarning custodial statement" can render post-warning statements admissible).

Seibert, like *Elstad*, thus reinforces that improper deviation from the *Miranda* safeguards does not prevent a suspect, who is properly advised of his rights, from later deciding to speak. As in those contexts, analysis under *Edwards* should not be governed exclusively by legal presumptions that for a significant period of time preclude a suspect from exercising free choice, despite the taking of curative measures.

4. The broad attenuation analysis used in Fourth Amendment cases is not warranted in the *Edwards* context

Although the record is not entirely clear, it appears that the trial court employed a broad attenuation analysis of the sort developed for use in addressing the admissibility of evidence derived from Fourth Amendment violations. See Pet. App. 79a (stating that prosecution must prove that respondent's waiver of right to counsel "was in no way due to the unlawful and coercive interrogation"); *id.* at 81a (emphasizing that "[t]here was no break in time or place" and "[n]o attenuation" between Officer Reese's statement and respondent's later incriminating statements). See generally *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975) (in determining whether illegal search or seizure under the Fourth Amendment requires suppression of subsequent confession, looking to "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct"); *Wong Sun*, 371 U.S. at 486. In both *Elstad* and *Seibert*, this Court rejected suggestions to employ the sort of broad attenuation analysis applicable in the Fourth Amendment. Cf. *Elstad*, 470 U.S. at 304-314; *Seibert*, 124 S. Ct. at 2610 n.4 (plurality opinion); see also *id.* at 2616-2617 (O'Connor, J., dissenting).[4]

[4] Although the *Seibert* plurality formulated a multi-factor test similar to *Brown's* for determining whether the second, warned confession was admissible, it "look[ed] to those factors to inform the *psychological* judgment regarding whether the suspect had been informed effectively of her right to remain silent." 124 S. Ct. at 2617 (O'Connor, J., dissenting). Hence, "[t]he analytical underpinnings of the two approaches [the plurality's and *Brown's*] are * * * entirely distinct, and they should not be conflated just because they function similarly in practice." *Ibid.*

Especially because *Edwards* is a prophylactic rule adopted to implement the *Miranda* rule, and thus post-invocation questioning does not itself violate the core of the Fifth Amendment, there is no more reason here than in *Elstad* and *Seibert* to apply the broad Fourth Amendment "fruits" analysis.

As the Court has observed, "the exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth," *Elstad*, 470 U.S. at 306 (quoting *Brown*, 422 U.S. at 601), and those differences warrant a different approach to the exclusion of purported derivative evidence. The Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Because the constitutional violation is already complete and cannot be cured, the purpose of the judicially created exclusionary rule is not to protect the defendant's rights, but to deter law enforcement officers from committing future Fourth Amendment violations. See, *e.g.*, *Brown*, 422 U.S. at 600-601. The Fourth Amendment test is designed to determine whether the "causal chain" between the Fourth Amendment violation and the confession is sufficiently "broken" so that the admission of a confession that stems from a Fourth Amendment violation will not undermine the deterrent rationale of the exclusionary rule. *Id.* at 602-603; *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982). No curative measure, such as the giving of *Miranda* warnings, can definitively break the causal chain, because the ques-

tioning in at least some degree is always an "exploitation of the illegality," if only in the sense that the illegal search or seizure made the questioning possible. *Brown*, 422 U.S. at 600; see *id.* at 603 (*Miranda* warnings are an "important factor," but do not automatically mean that "the Fourth Amendment violation has not been unduly exploited").

In the *Edwards* context, as in *Elstad*, there has been only a violation of a prophylactic rule designed to protect an underlying constitutional right.[5] The purpose of excluding statements under *Edwards* is to provide an additional safeguard for the defendant's Fifth Amendment right at trial to be free from compelled self-incrimination. A curative measure that ensures that, before the time of a subsequent waiver, the defendant understood that police would honor his decision not to speak to them without counsel eliminates the need for a presumption of coercion and thus for excluding the statements. Particularly where (as here) the accused has made no incriminating statements at the time police take curative action, such curative measures would put the accused in the *very same position* he was before he was subject to post-invocation questioning.

Accordingly, whereas the Fourth Amendment test focuses on the extent of any objective causal connection between the completed Fourth Amendment violation and the confession, the relevant inquiry here must more narrowly focus on whether the curative measures taken neutralized the impact

---

[5] See *Chavez* v. *Martinez*, 538 U.S. 760, 772 (2003) (plurality opinion) (custodial interrogation without administration of *Miranda* warnings does not violate the Constitution, so that there is no right to damages under 42 U.S.C. 1983 for such interrogation); *id.* at 777 (Souter, J., concurring in the judgment) (cause of action for damages for unwarned interrogation would be "well outside the core of Fifth Amendment protection"); *id.* at 789 (Kennedy, J., concurring in part and dissenting in part) (agreeing with plurality opinion that a "failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues").

of police-initiated, post-invocation questioning on the defendant's ability validly to waive his rights. See *Seibert*, 124 S. Ct. at 2610 n.4 (plurality opinion) ("[i]n a sequential confession case," the appropriate inquiry is "whether in the circumstances the *Miranda* warnings given could reasonably be found effective," thereby permitting a valid waiver); *Elstad*, 470 U.S. at 309 ("Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn * * * *solely* on whether it is knowingly and voluntarily made.") (emphasis added).

C. A Rule That Improper Police Comments Cannot Be Cured Absent A Break In Custody Or A Lapse In Time Would Impose Unjustified Costs On The Criminal Justice System

In determining whether to apply the *Miranda* and *Edwards* rules to a new class of cases, this Court consistently has weighed the benefits of applying those rules against the costs incurred in those circumstances. See, *e.g.*, *Quarles*, 467 U.S. at 657; *Elstad*, 470 U.S. at 308-309; *Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974). Refusing to recognize the efficacy of curative measures under *Edwards* would impose unjustified costs on the criminal justice system that outweigh any countervailing interests.

The cost to the criminal justice system of suppressing voluntary confessions is great. Voluntary admissions of guilt "are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Texas* v. *Cobb*, 532 U.S. 162, 172 (2001) (final quotation marks omitted) (quoting *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986)); *McNeil*, 501 U.S. at 181; *Elstad*, 470 U.S. at 305. Excluding such admissions damages the truth-seeking function of criminal trials and runs a serious risk of permitting guilty defendants to go free. It likewise imposes significant costs on the justice system to pre-

sume conclusively that once police have approached a suspect who has previously invoked his right to counsel, *any* communication initiated by the suspect was the product of coercion—notwithstanding the prompt administration of curative measures. "It is not unusual for a person * * * who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome the opportunity to talk." *Edwards*, 451 U.S. at 490 (Powell, J., concurring in the result); *McNeil*, 501 U.S. at 178 ("suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions").

There is no justification for automatically incurring those costs simply because the police engaged in questioning after a request for counsel, even if the police take effective steps to cure the continuing effects of that action. This Court has consistently rejected constructions of the *Miranda* rule that would render it "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation," noting that such an interpretation "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigation activity." *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975); cf. *United States* v. *Ceccolini*, 435 U.S. 268, 278 (1978) ("[W]e have specifically refused to hold that 'making a confession under circumstances which preclude its use, perpetually disables the confessor from making a useable one after those conditions have been removed.'") (quoting *United States* v. *Bayer*, 331 U.S. 532, 541 (1947)).

Recognizing that curative efforts may be effective would not derogate from any deterrent function of the *Edwards* rule.[6] (Indeed, it would provide a healthy incentive to take

[6] The *Edwards* rule, of course, does not directly deter constitutional violations. See *United States* v. *Patane*, 124 S. Ct. 2620, 2629 (2004) (plurality opinion) (because police do not violate a suspect's constitutional rights by failing to give *Miranda* warnings, "there is * * * nothing to deter"); but see *id.* at 2631 (Kennedy, J., concurring in the judgment) (finding it "unnecessary to decide * * * whether there is '[any]thing to deter' so long as the unwarned statements are not later introduced at trial"); cf. also *Seibert*, 124 S. Ct. at 2616 (O'Connor, J., dissenting) ("This Court has made clear that there simply is no place for a robust deterrence doctrine with regard to violations of *Miranda* v. *Arizona*.").

curative measures when police take actions that, it left uncorrected, would lead to suppression under *Edwards*.) Police already have substantial incentives to refrain from interrogating suspects who have invoked their right to counsel. The inadmissibility in the government's case in chief of any statement obtained before curative steps were taken itself provides a strong incentive to comply with *Edwards*. See *Harris* v. *New York*, 401 U.S. 222, 225 (1971) ("[S]ufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."). Police officers who engage in interrogation after a suspect has invoked his right to counsel also run the risk of a judicial finding that any statement given was coerced. See *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975). In that event, the initial statement would be unusable for any purpose, physical evidence derived from the statement might have to be suppressed, and before any subsequent statements were admissible, the court would have to consider whether the effects of the coercion "ha[d] carried over into the second confession." *Elstad*, 470 U.S. at 310.

In contrast, officers who abide by *Miranda* and *Edwards* are likely to persuade courts that all the statements they have obtained are voluntary. As this Court has explained, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984); accord *Seibert*, 124 S. Ct. at 2608 (plurality opinion); *Dickerson*, 530 U.S. at 444. Thus, considering curative measures in determining whether a defendant

has initiated communication will still leave officers with strong incentives to honor a suspect's request to remain silent. See *Hass*, 420 U.S. at 723 (stating that the risk that an officer intentionally will "continue[] his interrogation after the suspect asks for an attorney" because there is "perhaps something to gain by way of possibly uncovering impeachment material" is only a "speculative possibility").

There is no appreciable danger that considering curative measures in applying *Edwards* would enable law enforcement officers to circumvent the *Edwards* rule, as by engaging in an intentional two-step strategy of the sort that was at issue in *Seibert*. If officers themselves initiate interrogation of a suspect a second time, they would once again run afoul of *Edwards* and statements obtained would be inadmissible. An officer's ability to obtain admissible statements after a suspect's invocation of the right to counsel turns entirely on the *suspect* taking the initiative to approach the *police*—and that event is outside their control. If the curative measures are sufficient, initial post-invocation questioning would make the suspect no more likely to initiate a discussion with the police. And it would make no sense for police officers deliberately to initiate questioning after a suspect has invoked his right to counsel, with all the risks that that entails, on the mere hope that, after they have assured the suspect that henceforth they will honor his request to stop discussing the case, he will voluntarily approach police and initiate further communication. Cf. *Nix* v. *Williams*, 467 U.S. 431, 445 (1984) ("A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.").

D. Detective Johns's Statements Dissipated The Effects Of Post-Invocation Questioning

The Maryland Court of Appeals concluded that although respondent had "initiat[ed]" communication with police in

the "'dictionary sense' of the word," he did not initiate communication "as that term is contemplated in the legal sense," Pet. App. 26a, because "the voluntariness of such 'initiation' [wa]s suspect" in light of the prior police questioning after respondent's request for counsel. *Id.* at 28a. That conclusion was mistaken. This case provides a particularly strong illustration of curative actions that effectively negated the effects of the improper question.[7]

Detective Johns's immediate response to Officer Reese's statement—loudly stating, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now," Pet. App. 6a, and ushering Officer Reese out of the holding cell—made plain to respondent that the officers were barred from talking to him in light of his invocation of the right to counsel, that respondent's invocation of his right to counsel would be honored, and that efforts to badger him into talking would not be tolerated. If, before intervening, Johns had stood by and allowed respondent to make incriminating statements in response to Reese's statement, or had allowed Reese to continue to attempt to elicit incriminating statements, respondent might have had cause to question

---

[7] Before respondent initiated communication with police, the only conduct that occurred that could qualify as "interrogation" was Officer Reese's statement, "I bet you want to talk now, huh!" Detective Johns's acts of handing the charging papers to respondent and informing him of the charges did not constitute interrogation. Maryland law required the officers to "inform the defendant of the nature of the offense charged" and to serve "[a] copy of the warrant and charging document • • • on the defendant promptly after the arrest." Md. R. 4-212(e); cf. Fed. R. Crim. P. 4(c)(3)(A); Fed. R. Crim. P. 9(c)(1)(a); Fed. R. Crim. P. 4, advisory committee notes to 2002 amendments ("Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists."). Such routine behavior in conjunction with an arrest is not tantamount to interrogation. This Court has held that statements by law enforcement officers "normally attendant to arrest and custody," *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980)—which certainly includes notice of the charges as required by court rules—do not constitute interrogation for purposes of *Miranda*.

Johns's good faith. Cf. *Bautista*, 145 F.3d at 1151 (continuing interrogation after invocation would increase the coercive effect of custody, "because the suspect would believe that the police 'promises' to provide the suspect's constitutional rights were untrustworthy") (quoting *Tukes* v. *Dugger*, 911 F.2d 508, 516 n.11 (11th Cir. 1990), cert. denied, 502 U.S. 898 (1991)). But Johns's decisive action clearly demonstrated that respondent was not expected to respond to Reese's remark and that he would not be subject to further questioning before counsel arrived.

Nothing in the surrounding circumstances suggests that Detective Johns's action was ineffective to assure respondent that the officers would respect his rights. Because of Detective Johns's prompt action, there is no question here of the authorities having exploited a prior confession in order to obtain a new one. Cf. *Seibert*, 124 S. Ct. at 2612 (plurality opinion). And Officer Reese's eight-word statement was a far cry from the sort of sustained badgering that prompted the *Edwards* rule. Cf., *e.g.*, *Edwards*, 451 U.S. at 479. Reese did not conduct a full-scale, formal interrogation, but instead made what reasonably appears to be a statement in the heat of the moment. Nor did the statement involve threats, promises, inducements, or a demand for an answer.[8] See Pet. App. 52a.

[8] There was also no finding that police planned Reese's question as an intentional strategy to undermine respondent's invocation of the right to counsel. Because intentionally improper conduct in this setting is unlikely in any event, see pp. 24-26, *supra*, analysis should focus on the objective character of the police action. The trial judge explicitly concluded that the boilerplate statement of penalties included in the charging document, which incorrectly suggested that the defendant was eligible for the death penalty, was not done intentionally to influence the defendant, Pet. App. 72a, and in any event, that reference did not constitute "interrogation" within the meaning of *Miranda*. See note 7, *supra*. Any role that the misleading reference to the death sentence may have played in motivating respondent to re-initiate dialogue with the police does not undercut the fact that Detective Johns cured the only improper conduct under *Edwards*

The circumstances of respondent's reinitiation also justify respecting it as an act of respondent's choice. Twenty-eight minutes elapsed between Detective Johns's curative statement and respondent's request to talk, during which the officers made no attempt to resume the interrogation and did not return to respondent's cell. And respondent expressed his desire to speak to *Detective Johns*, who had returned to respondent's cell for unrelated purposes (to deliver clothes retrieved from respondent's home). Respondent had no reason to fear that Johns would attempt to elicit statements from him, since Johns was the officer who had earlier rebuked Reese and made clear that the police would respect his wishes not to be questioned in the absence of counsel. Officer Reese was not present. Cf. *Elstad*, 470 U.S. at 310 ("When a prior statement is actually coerced, * * * [a] change in identity of the interrogators * * * bear[s] on whether coercion has carried over into the second confession."). Finally, before allowing respondent to discuss the case, Detective Johns gave him a fresh set of *Miranda* warnings. The warnings not only reaffirmed respondent's right to counsel, but provided respondent with an additional demonstration of Detective Johns's attention to the protection of his rights.

In short, despite Officer Reese's improper comment, by the time respondent waived his rights he could not have reasonably believed that his right to counsel was a fiction or that he faced the threat of further uncounseled interrogation by police. Indeed, Detective Johns's prompt rebuke of Officer Reese provided respondent with a demonstration of the *Edwards* rule that should have left him even more confident about the reality of his right to counsel than the ordinary suspect would be after initially receiving *Miranda* warnings. Under the circumstances, there is every reason to respect

by reaffirming respondent's invocation of his right to counsel and by stating that "[w]e cannot talk to him now." Pet. App. 6a.

respondent's decision to initiate dialogue with the police, and no reason to apply the "extraordinary" (*McNeil*, 501 U.S. at 183 (Kennedy, J., concurring)) and conclusive presumption of coercion to the statements respondent made after initiating communications with police.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JOHN P. ELWOOD
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

JUNE 2005

(5)

Supreme Court, U.S.
FILED
JUN 9 - 2005
OFFICE OF THE CLERK

No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. LISIC
DIANE E. KELLER
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422
(410) 576-6475 (Fax)

Counsel for Petitioner

KENNETH W. RAVENELL*
MATTHEW A.S. ESWORTHY
IVAN J. BATES

Schulman, Treem, Kaminkow,
Gilden & Ravenell
Suite 1800
World Trade Center
401 E. Pratt Street
Baltimore, Maryland 21202
(410) 659-0111
(410) 332-0866 (Fax)

Counsel for Respondent

**Counsel of Record*

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 2004
CERTIORARI GRANTED APRIL 18, 2005

TABLE OF CONTENTS

Page

Relevant Docket Entries ..... JA 1-2

Transcript of Proceedings of May 9, 2003
(Hearing on motion to suppress) ..... JA 3-164

Transcript of Proceedings of May 16, 2003
(Hearing on motion to suppress) ..... JA 165-328

Statement of Charges ..... JA 329-341

Affidavit ..... JA 342-343

Transcript of Proceedings of June 3, 2003
(Circuit court ruling) ..... JA 344-368

Unreported opinion of the Court of Special Appeals,
State of Maryland v. Leeander Blake,
No. 771, September Term, 2003 ..... JA 369-394

Reported opinion of the Court of Appeals,
Leeander Blake v. State of Maryland,
381 Md. 218, 849 A.2d 410 (2004) ..... JA 395-419

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 1, 2002 — One count indictment filed in Criminal Number K-2002-2154, charging first and second degree murder and manslaughter.

December 6, 2002 — Eight count indictment filed in Criminal Number K-2002-2417, charging first and second degree murder and manslaughter, armed robbery, armed carjacking, three counts of conspiracy, use of a handgun in a felony, and use of a handgun in a crime of violence.

January 23, 2003 — Defendant's motion to suppress pursuant to Md. Rule 4-252 filed.

May 9 and 16, 2003 — Defendant's motion to suppress heard and held sub curia.

June 3, 2003 — Bench ruling granting defendant's motion to suppress.

June 16, 2003 — State of Maryland's notice of appeal filed.

October 29, 2003 — Unreported opinion of the Court of Special Appeals reversing order granting motion to suppress.

November 10, 2003 — Mandate of the Court of Special Appeals issued.

November 13, 2002 — Defendant's petition for writ of certiorari filed in the Court of Appeals of Maryland.

November 14, 2003 — Order of the Court of Appeals of Maryland granting the petition for writ of certiorari.

May 12, 2004 — Reported opinion of the Court of Appeals of Maryland reversing judgment below.

June 16, 2004 — State's motion for reconsideration denied by the Court of Appeals of Maryland.

[1] IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,	*	
	*	
v.	*	Criminal Nos.
	*	K-2002-01254
	*	K-2002-02417
LEEANDER JEROME BLAKE,	*	
	*	
Defendant.	*	
	*	Annapolis, Maryland

May 9, 2003

MOTIONS HEARING

WHEREUPON, proceedings in the above-entitled matter commenced.

BEFORE: THE HONORABLE PAMELA L. NORTH,
Judge

APPEARANCES:

FOR THE STATE:

FRED PAONE, Esq.
PAMELA ALBAN, Esq.
Office of the State's Attorney
Circuit Courthouse
7 Church Circle, Suite 200
Annapolis, Maryland 21401

14[2] APPEARANCES (Continued):

FOR THE DEFENDANT.

KENNETH W. RAVENELL, Esq.
Schulman, Treem, Kamikow,
Gilden and Ravenell, P.A.
World Trade Center
401 E. Pratt Street, Suite 800
Baltimore, Maryland 21202

IVAN JULES BATES, Esq.
724 Reservoir Road
Baltimore, Maryland 21217

[3] INDEX

	Page
General Discussion	5
Comments by Kenneth Ravenell, Esq. Attorney for the Defendant	6
Comments by Pamela Alban, Esq. Attorney for the State	8

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
For the State:				
William Johns	11	36 71(CT) 73 (KR)	75 84	83
Lloyd Edward White, Jr.	85	98	104	--
Mary Ann Costello	107	110	--	--
For the Defendant:				
Curtis Reese	114	136	139	--

EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
For the State		
1	16	16
2	26	26
5	29	31
6	79	79
3	87	89
4	92	92
[4] For the Defendant		
A	53	53
B	59	--
C	128	--
D	130	132

Keynote: "---" indicates inaudible in the transcript.

[5] PROCEEDINGS

MR. PAONE: Good morning. Once again, Your Honor, it if please the Court, the State would call State versus Leeander Jerome Blake, K-2002-2154 and 2417. My name is Fred Paone. I am an Assistant State's Attorney for Anne Arundel County on behalf of the State.

MS. ALBAN: Pamela Alban on behalf of the State as well.

THE COURT: All right. Thank you.

MR. RAVENELL: Good morning, Your Honor. For the record, Ken RAVELELL [sic] and Ivan Bates on behalf of Mr. Blake who is present in the Courtroom now.

MR. BATES: Good morning, Your Honor.

THE COURT: All right. Could you spell your last name for the record, sir. Mr. Ravenell.

MR. RAVENELL: Yes. R-a-v-as in Victor-e-n-e-l-l.

MR. BATES: Ivan, I-v-a-n Bates, B-a-t-e-s.

THE COURT: All right. Thank you. Okay. And we are here for motions. Defense motions, I assume. Mr. Ravenell what is the nature of the motions.

MR. RAVENELL: Your Honor, the motion is to suppress statements that Mr. Blake gave to the police on October 26, 2002.

THE COURT: Okay. And now is that the only think

[sic] you are moving to suppress?

[6] MR. RAVENELL: Yes, Your Honor.

THE COURT: Okay. There are no other issues of physical evidence or pretrial identification?

MR. RAVENELL: Well, there is one pretrial identification, but I understand that the State is not at this time intending to use that pretrial identification.

THE COURT: Okay. Is that correct, Mr. Paone?

MR. PAONE: I believe that is the case, Your Honor. If it changes, I certainly will let everybody know.

THE COURT: Okay. All right. And just so I know where we are going for the rest of the day, are there going to be other motions in addition to your motion to suppress today that are unrelated to suppression?

MR. RAVENELL: No, Your Honor.

THE COURT: Okay. That is the only motion.

MR. RAVENELL: That is.

THE COURT: Okay. All right.

MS. ALBAN: Do you want address the time frame?

MR. PAONE: Yes.

MS. ALBAN: We are concerned, Your Honor, because of the late hour that we are getting started, it could

carry over. The State would anticipate in calling four witnesses. Two would be rather lengthy. I believe two would be rather brief.

And I know that the Defense has asked me to make people available to be here. I am not sure how many witnesses they have. **[7]** I am concerned about the time period because my understanding is Mr. Ravenell would not be available if it is carried over into Monday.

THE COURT: Okay. Are you available on Tuesday?

MR. RAVENELL: Your Honor, I am scheduled to start a Federal trial on Monday that should last three to four days. Now, there is a possibility if certain motions are granted on Monday that that case may be aborted as of Monday.

THE COURT: Okay. Can you ask my law clerk to bring in my calendar?

THE CLERK: Sure.

MS. ALBAN: Your Honor, then while we are waiting that, I have given Mr. Ravenell a copy of our motion that we are filing today for appropriate relief. I would file a copy with the Court at this time.

THE COURT: Okay. Is that a motion that will require hearing?

MR. RAVENELL: We are just receiving it, Your Honor. It may, because it is dealing with disclosure of juvenile records.

THE COURT: All right. Well, do we have a trial date

in this case yet?

MS. ALBAN: Yes, Your Honor.

THE COURT: And when is that?

MR. PAONE: May 21st.

[8] THE COURT: May 21st. Mr. Ravenell, would it be possible for you to file your response to this in less than the normal 15 days?

MS. ALBAN: Your Honor, the motion would be pertinent for today and for the testimony today. Basically, what we are looking to do is, Your Honor, this is a motion on the suppression of the statement.

The State has the burden by the preponderance of evidence to show in fact that it was voluntary. And that the State must address issues as far as education, experience, contact with the prior -- prior contact with the criminal justice system.

I have had conversations with his probation agent and Jennifer Beard who conducted an INR in one of the Defendant's prior cases and I was intending to introduce them and their testimony.

But according to their attorney, they cannot do so unless you sign the order. The State feels that that would be good cause to sign that order. We would not use it for any other purpose than to show the voluntariness at this hearing. And we would address any further issues for another hearing at that time.

THE COURT: Okay. Thank you.

MR. RAVENELL: The problem with that, Your Honor, is that we obviously just received this by a fax on late **[9]** yesterday. And, the question becomes, you know, whether the Court should turn over juvenile records and make it a part of this proceeding without a full briefing on that.

THE COURT: Well, I would prefer to see them first to see what kind of information is in it.

MS. ALBAN: They have -- the probation agent is present with her file. And, I have had the file brought up from the juvenile desk as to the INR. It contains the INR we are looking to testimony to.

THE COURT: All right. Well, that is not the first thing you were going to introduce, is it?

MS. ALBAN: It does not need to be.

THE COURT: Okay. Because perhaps we could take a break this afternoon and we can look at the records in Chambers and see what they have in them.

MS. ALBAN: Okay.

THE COURT: Okay?

MS. ALBAN: Yes.

THE COURT: Does that sound fair to you?

MR. RAVENELL: That is fine.

THE COURT: Okay. All right, Mr. Paone.

MR. PAONE: State would request a rule on witnesses, Your Honor.

THE COURT: All right. Anyone who is in the Courtroom who is going to testify for either side in the case **[10]** will have to remain outside the Courtroom until you are called to be a witness.

Once you are called -- how [sic] listen to the rest of this. Once you are called as a witness, you are not to discuss anything you were asked or anything that you were told or anything that occurred in the Courtroom. Is that a witness who just left?

MR. PAONE: I believe so, Your Honor.

MR. RAVENELL: Yes, it is, Your Honor.

THE COURT: Will you ask her to come back so she can hear the rest of my instructions?

MR. RAVENELL: Yes, Your Honor.

THE COURT: Thank you. Okay. What I was about to say is once you have been called as a witness you are not to discuss anything that you testified to, any of the questions you were asked, or anything that occurred in the Courtroom with anyone. Okay?

(No audible response.)

THE COURT: All right. Thank you. Are both sides satisfied that you have no witnesses presently in the

Courtroom?

MR. RAVENELL: Yes, Your Honor.

MS. ALBAN: Yes, Your Honor.

THE COURT: Okay. All right. And just to let you know, counsel, we can't go beyond 12:30 this morning. But we **[11]** will come back at 1:30. Who is going to be handling the motion? You or Ms. Alban?

MS. ALBAN: I am, Your Honor.

THE COURT: Ms. Alban, okay.

MS. ALBAN: Your Honor, the State does not have any opening remarks.

THE COURT: All right. Mr. Ravenell would you like any opening remarks?

MR. RAVENELL: No, Your Honor. Unnecessary.

THE COURT: Okay.

MS. ALBAN: Your Honor, then we would be calling Detective Johns to the stand.

Whereupon,

WILLIAM JOHNS

was called as a witness by the State, having been first duly sworn, was examined and testified as follows:

THE CLERK: You may be seated. Please state your name and occupation. Spell your last name for the record.

THE WITNESS: My name is William Johns, J-o-h-n-s. I am a detective with the Annapolis Police Department.

THE COURT: Okay, whenever you are ready.

MS. ALBAN: Thank you.

DIRECT EXAMINATION

BY MS. ALBAN:

Q Detective Johns, how long you been a police officer?

[12] A Over 20 years.

Q And how long you been with Annapolis City?

A That entire time.

Q Okay. What is your current duty assignment?

A I'm currently assigned to criminal investigation division.

Q Okay. And was that your same duty assignment in September and October of 2002?

A Yes, it was.

Q Let me draw your attention to a homicide that occurred on September 19, 2002, on Cumberland Court in Annapolis, in Anne Arundel County. What was your role in that

investigation?

A I was the lead investigator.

Q Did there come a time that you made some arrests in that case?

A Yes.

Q And when did you make those arrests?

A One on October 25th. One on October 26th.

Q Okay. Who did you arrest on October 25th?

A Terrence Tolbert.

Q And who did you arrest on October 26th?

A Leeander Blake.

Q Do you see Mr. Blake in the Courtroom today?

A Yes. He's seated at Defense counsel in the middle, [13] in the center position.

MS. ALBAN: For the record, identifying the Defendant.

BY MS. ALBAN:

Q What time was Mr. Blake arrested?

A It was at about 5:08 a.m.

Q When had you learned that Mr. Blake may be involved in this homicide?

A The day before, October 25th.

Q And where was Mr. Blake arrested?

A At his home in Robinwood.

THE COURT: I am sorry, where?

THE WITNESS: His home in Robinwood.

BY MS. ALBAN:

Q And when he was placed under arrest, what happened to him at that point?

A He was transported by a patrol officer to the Annapolis Police Department.

Q And where did you first have contact with him?

A At the Annapolis Police Department.

Q What did you do when you had contact with him?

A I introduced myself then I began to advise him of his rights.

Q Okay.

THE COURT: Let me interrupt you for one second.

[14] (Pause.)

THE COURT: All right. I am sorry. Go ahead.

BY MS. ALBAN:

Q You said you advised him of his rights. What rights were those?

A The Miranda rights.

Q Okay. At what time did you begin to advise him of his rights?

A At approximatly [sic] 5:11 a.m.

Q Was anyone else present when you did this?

A Yes. Corporal Tom Hannon was present.

Q And where was this done?

A It was done in the Annapolis Police Department. The lower leave [sic] in what we call an intake room, or sometimes called a booking room.

THE COURT: All right. Was that Hammond?

THE WITNESS: Hannon. H-a-n-n-o-n.

THE COURT: Corporal Hannon was present, is that what you said?

THE WITNESS: Yes.

THE COURT: Along with you, right?

THE WITNESS: Yes, ma'am.

THE COURT: Okay.

BY MS. ALBAN:

Q Was there anyone besides the two of you present?

[15] A No.

Q And you said it was done in an intake room.

A Correct.

Q Could you describe that room for us?

A It's approximately ten foot square. Has a little bathroom off of it. It has a table in the center. A chair on each side of the table and a third chair on the one side of the table. There is a window on each of three walls. Correction, yeah, there is a window in three of the four walls.

Q Did you have your weapons on at that point?

A No, I did not.

Q Could you describe to the Court how you advised Mr. Blake of his rights?

A We have a standard form we use. I placed a copy of the form in front of him. And I read it to him and asked him to read along with me. I read it out loud. And as I get to a point where it tells what each specific right is, I will read the right to him, ask him if he understands it.

If he says he understands it, I advise him there is a line next to the right, I advise him to put his initials on the line if he understands it. If he has any questions, I tell him to ask me if he has any questions.

Q Let me show you what has been marked as State's Exhibit Number 1. Do you recognize what that form is?

A Yes. That's our rights form. That's the one I used [16] that day at about 5:11.

Q There appears to be some initials besides numbered items. What are those? Whose are those?

A Those are Leeander Blake's initials.

Q Okay. And, who put them on that form?

A Leeander Blake did.

Q Okay. And then there are two signatures at the bottom. Whose signatures are those?

A One is Leeander Blake's and the other is mine.

Q And did you see Mr. Blake put that signature on the bottom?

A Yes, I did.

MS. ALBAN: Your Honor, the State would move to have State's Exhibit Number 1 admitted into evidence?

THE COURT: Mr. Ravenell, do you have any objection?

MR. RAVENELL: No objection, Your Honor.

THE COURT: All right. That will be admitted.

(The document referred to was marked for identification as State's Exhibit 1 and was received in evidence.)

BY MS. ALBAN:

Q At that time, did Mr. Blake indicate whether or not he wanted to speak with you?

A He indicated that he did not wish to speak with me.

[17] Q When he did that, what did you do?

A I had him sign the form indicating that he did not wish to speak with me. And then a few minutes later he was placed in the holding cell.

Q Did you say anything to him after he indicated he did not wish to speak with you?

A No.

Q Did you question him?

A No, I did not.

Q Could you describe Mr. Blake's demeanor during this?

A He was calm and cooperative, matter of fact.

Q Okay. So, he was placed back in the cell after he invoked his rights?

A Correct.

Q And what time was that?

A That was at approximately 5:25 a.m.

Q Okay. And who did that?

A Corporal Hannon did that.

Q You testified that you are the lead investigator in this case. What is your responsibility with regards to any prisoners that may be at the station as the lead investigator?

A As a general rule, when you have a prisoner you are responsible for that prisoner. You are responsible for making sure he is taken care of. We are required to make checks on our prisoners approximately every half hour or so to make sure [18] they are okay. Normally that is the arresting officer's function if he is able to do that.

Q And if he is not?

A He can have someone else do it. A supervisor comes over and does it sometimes.

Q Do you have a station attendant?

A No.

Q After Mr. Blake was placed in a cell did you have occasion to have contact with him again?

A Yes, I did.

Q And about what time was that?

A That was at approximately 6:00 a.m.

Q Was anyone else present when you were having contact with him at 6:00 a.m.?

A Yes.

Q Who was present?

A Officer Reese.

Q And what is Officer Reese's -- or what was his role in this investigation?

A He simply assisted in transporting Mr. Blake from his home to the station.

Q Did he have any other contact with Mr. Blake?

A None that I am aware of.

Q Okay. Is he a detective or a uniformed officer?

A He's a uniformed officer.

[19] Q Why did you have contact with Mr. Blake at 6:00 a.m.?

A I walked the -- his copy of his arrest warrant back to give him -- to give it to him so he could read it.

Q Okay. What did you say to Mr. Blake as you did that?

A I explained what the charges were. Let him know what he was charged with. I told him they were serious charges. He need to read it carefully and make sure he understood it.

Q Did the Defendant do that in your presence?

A Not in my presence, no.

Q What happened after you handed him the charges and told him to read them carefully?

A I turned to walk out. At that point Officer Reese had walked back there with me. And at that point Officer Reese said something to the effect of, "I bet you want to talk now, huh?"

Q What was your reaction when Officer Reese said that?

A I was quite surprised. It was unexpected.

Q What did you do?

A I, very loudly, said, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." I literally put my hands in front of me and walked Officer Reese back out of the cell block area and around the **[20]** corner. And then I shut the door, secured it, went out and left the area.

Q Now, you indicated you said very loudly and forcefully. Why did you say these things very loudly and forcefully?

A Number one, I did not want Officer Reese to say

anything else that could be heard by the Defendant. And I did not want to hear anything the Defendant may have said.

Q Would Mr. Blake have heard what you were saying to Officer Reese?

A Oh, yes, clearly.

Q What was the Defendant's demeanor at that point when you were serving the charges on him?

A He was calm, quiet.

Q Did you have any idea that Officer Reese was going to say anything?

A No, I did not.

Q So was this a preconceived plan that you had with Officer Reese?

A No, it was not.

Q What did you do when Officer Reese did this?

A Do you mean after we left the cellblock?

Q Yes.

A I told him, I said, "He's already asked for an attorney. We cannot reinitiate any kind of conversation with **[21]** him."

Q And then did you tell anyone else that this had happened?

A Yes. I went outside. I found my supervisor, Sergeant Kirchter, and I advised him what happened.

Q What was the next contact that you had with Mr. Blake?

A It was approximately a half hour later. They had brought some clothes for him. When he was brought in he only had on a t-shirt and shorts. And they had told me over the radio they were bringing some clothes for him to keep him warm. Our cellblock is made out of concrete and steel, so it gets chilly in there. So they brought some clothes over and I walked the clothes back to him.

THE COURT: Sir, who do you mean by they? Police officers or his family?

THE WITNESS: It was another officer. I can't specifically remember who handed me the clothes.

BY MS. ALBAN:

Q They delivered those clothes to you specifically?

A Yes.

Q And then you provided them -- you were intending to provide them to the Defendant?

A Yes. I walked them back to him.

Q Okay. What did you do when you went back there?

[22] A I simply opened -- there are two doors. There is the door that leads to the area that has four different cells. And

then each cell has a door on it. I opened the exterior door. Walked in front of his cell. And said, "Here's some clothes for you." And I handed them to him.

Q Okay. And then what did you do after you handed it to him?

A I was getting ready to leave. I turned to walk out.

Q Okay. What happened as you got ready to leave?

A Leeander Blake said, "I can still talk to you?"

Q And what did you say when the Defendant said this to you?

A I asked him, I said, "Are you saying that you want to talk to me now?"

Q And what did he say?

A He said, "Yes."

Q What happened then? What did you ask him then?

A I told him I was going to have to read him his rights again. And, he said, "Okay." So, I told him I would be back in a few minutes.

Q What was the Defendant's demeanor at that point?

A He was calm. Same as before.

Q Okay. You described there was an area with four cells and you stood before the Defendant's cell. Was there anyone

else in the cell with the Defendant?

[23] A No.

Q So he was alone in his own cell.

A Correct. All the other cells were empty also.

Q So there was no one else back there.

A That's correct.

Q Okay. After you left him in that cell, what did you do?

A I went out and advised Corporal Hannon and Sergeant Kirchter that he now wanted to talk to me and re-secured my weapon and got ready to re-interview him, to re-read him his rights?

THE COURT: Who did you tell? Hannon and who?

THE WITNESS: Sergeant Kirchter.

BY MS. ALBAN:

Q Where did you bring the Defendant at that point?

A Back into the same room, the intake room.

Q Okay. And that is the same room that you have described to the Court.

A Yes.

Q Okay. What did you do when you got back to that

room?

A We sat down at the table and I went through the rights for him again. The same as I did before.

Q And what time did you begin to do that?

A That was at approximately 6:40 a.m.

[24] Q Okay. And who was present with you?

A Corporal Hannon was present.

Q Could you explain to the Court how you advised Mr. Blake of his rights at this time?

A In the same manner. I read the form to him. I had a copy in front of him. And I went through it exactly as I did before. Read it out loud. As I read each right, asked him if he understood it. And I waited for an affirmative response. After he said he understood it, I said, "If you do understand it, put your initials on the line next to it."

Q And did he initial the lines?

A Yes, he did.

Q And then what did you do after he initialed each line?

A Got to the bottom of the form and asked if he understands each of the rights. He wrote, yes. And initialed that. Had him sign it indicating that he agreed to talk without an attorney present. And then I conducted an interview.

Q I am going to show you what has been marked as

State's Exhibit Number 2 and ask you if you recognize what that is?

A Yes, I do. That's the rights form I used the second time I advised him of his rights.

Q Okay. And I see again there are blank lines before **[25]** a numbered rights, there are a pair of initials on there. Whose initials are those?

A Those are Leeander Blake's initials.

Q Okay. And there are two signatures on that form. Whose signatures are those?

A One is Leeander Blake's and the other is mine.

Q And you observed Mr. Blake placing both the initials and his signature on the form.

A Yes, I did.

Q And then what rights are covered by this form?

A His absolute right to remain silent. He is advised that anything he say will be used against him in Court. He is advised that nothing is being promised to him and that no threats are or will be made against him.

He is advised he has a right to talk to a lawyer and to have the lawyer then, or at any time during questioning. He is advised that if he answers questions without a lawyer and changes his mind, the questions will stop if he requests the presence of a lawyer.

And he is advised that if he can't afford a lawyer, one will be provided without cost before any questioning if he desires.

Q Thank you.

MS. ALBAN: Your Honor, the State would move to admit State's Exhibit Number 2.

[26] THE COURT: All right any --.

MR. RAVENELL: No objection.

THE COURT: That is admitted.

(The document referred to was marked for identification as State's Exhibit 2 and was received in evidence.)

BY MS. ALBAN:

Q Did you ascertain how old Mr. Blake was?

A Yes.

Q How old was he?

A 17.

Q And what was his education?

A He said he had completed 12th grade. I am sorry, 10th grade.

Q He completed the 10th grade.

A 10th grade, yes.

Q Did you make any observations with regard to his sobriety?

A He appeared to be sober. He told me he was sober.

Q So he appeared both to you to be sober and he indicated that he was, in fact, sober?

A Yes.

Q Did you ask about whether he was on any medications?

A Yes, I did.

[27] Q And what was his response?

A He said he uses an asthma inhaler.

Q Did you make any other observations about his physical person at that time?

A He seemed absolutely normal. Didn't appear to be any physical problems or mental problems.

Q Okay. You said there didn't appear to be any mental problems. Was he able to hold a normal conversation with you?

A Yes.

Q When you asked questions, were his answers

appropriate?

A Yes, they were.

Q Are you aware of any prior contacts with the police that the Defendant has had?

A Yes.

Q And what were those contacts? Oh, I am sorry. How many contacts were there?

A There were two previous contacts I was aware of.

Q Okay. How long did your interview last?

A It was approximately an hour.

Q Okay. What was the Defendant's demeanor again during this interview?

A He was calm and very cooperative. Very polite.

Q What was the tone of the questioning?

A I simply asked him to tell me what happened. And I **[28]** had him go through his whole version of events. If there was, you know, a minor point I didn't understand, I would ask him to clarify it. It was more of a narrative on his part.

Q Okay. How loud -- did your voices -- were your voices raised at any time?

A No. It was normal conversation tone.

Q Did you or Corporal Hannon physically mistreat him in any way?

A No.

Q Did you make any threats to him?

A No.

Q Did you make him any promises?

A No.

Q And did either of you have your weapons on at that point?

A No, we did not.

Q Was there a guard at the door?

A No.

Q What did -- at the end of Mr. Blake's substantive statement, did you ask any follow up questions of him?

A Yes, I did.

Q And what were those questions?

A I can't remember the specific wording without referring to the notes. But, basically to the effect of I asked him if he had originally declined to talk to us. And I **[29]** asked him if he had changed his mind and requested to talk to us.

Q And what were his responses to those questions?

A That -- both responses were "Yes" that was what happened.

Q When Mr. Blake was talking, were you taking notes during that time period?

A Yes, I was.

Q Okay. Do you have those notes with you today?

A Yes, I do.

Q Can I see them, please? (Reading.)

MS. ALBAN: Court's indulgence.

(Pause.)

BY MS. ALBAN:

Q I am going to show you what has been marked as State's Exhibit 5 and ask if you recognize what that is?

A Yes, I do.

Q What is that?

A It's a photocopy of page four of the notes I took that day.

(The document referred to was marked for identification as State's Exhibit 5.)

BY MS. ALBAN:

Q Okay. I am going to draw your attention to the **[30]** bottom of the page. There appears to be two questions. Are those the questions you testified about?

A Yes, they are.

Q Okay. I see a blank line drawn. What is-- first, what is the first question?

A The first question is, "Did you at first say you did not want to talk to us?"

Q Okay. And then what is after that?

A There is a blank line. And on the blank line is written the word, "Yes." And the initials "LB."

Q And who wrote, "Yes" and "LB" on that line?

A Leeander Blake wrote both of those.

Q Okay. And then there is a second question. What is the second question?

A The second question is, "Did you later change your mind and ask me if you could talk?"

Q And then what is after that?

A There is a line, with the word "Yes" written on it and the initials "LB."

Q And who wrote "Yes" and "LB?"

A Leeander Blake wrote both of those.

LBAN: Your Honor, the State will move to have this admitted. I will hold off at this point because we are going to redact it over lunch because there is part of the statement off that.

[31] THE COURT: Have you seen it Mr. Ravenell?

MR. RAVENELL: I have see it, Your Honor. And it was my suggestion that we just redact it to include the last two sentences as part of an exhibit for this motions hearing.

THE COURT: All right. Well, I won't look at it until you do that.

MS. ALBAN: Thank you.

THE COURT: All right. We will move it in, but I won't receive it actually until we redact it. And what exhibit was that? What number?

MS. ALBAN: Number 5.

THE COURT: Okay.

(The document marked for identification as State's Exhibit 2 [sic] was received in evidence.)

BY MS. ALBAN:

Q After the second advisement, was there any hesitation from Mr. Blake about speaking with you?

A No. None at all.

Q Did there come a time that you asked Mr. Blake if he would be willing to take a polygraph?

A Yes, I did.

Q And what was his response?

A He said he was willing to take one.

[32] Q Okay. What did you do when he said that he would?

A I made arrangements with Corporal Ed White of the Maryland State Police to do the test. And we notified his mother that that is what he wanted to do.

Q Okay. Where did this test occur?

A It occurred at the Maryland State Police Barracks J in Annapolis.

Q Was his mother present?

A She was at the barracks, yes.

Q Were you present when Corporal White advised Mr. Blake of his rights?

A Yes, I was.

Q Ok. Were you present during the statement that he made to --

A No.

Q -- during the polygraph administration?

A No, I was not.

Q Okay. When did you go back into the room?

A It was after the polygraph. Corporal White had come out and called me back in.

Q Okay. Did Corporal White at that time indicate that Mr. Blake had added more details to his story?

A Yes, he did.

Q What did you do when he indicated that to you?

A We had Mr. Blake repeat those new details to me.

[33] Q Did you ask Mr. Blake any questions at that time?

A No.

Q What did Corporal White ask Mr. Blake at that time?

A Something to the effect of, if I gave you the polygraph again, would you show deception?

Q And what did Mr. Blake do at that point?

A He provided an additional detail.

Q Did you ask Mr. Blake any questions during that?

A No, I did not.

Q Are these the only statements that you are aware of that Mr. Blake has made to the police concerning his involvement in the homicide that occurred on September 19, 2002?

A Yes.

Q Thank you, Detective.

MS. ALBAN: I have no further questions at this time.

THE COURT: Mr. Ravenell, I have to --

MS. ALBAN: Well, wait, Court's indulgence.

THE COURT: Okay. I have to leave in five minutes. Do you want to wait?

MR. RAVENELL: Yes, Your Honor.

THE COURT: To do your cross after lunch.

MR. RAVENELL: I prefer to wait. I am not going to finish in time.

[34] THE COURT Okay. Let's see what else she wants.

MS. ALBAN: Then I am finished, Your Honor.

THE COURT: That is it? Okay. Thank you, sir. I am going to excuse you and ask you not to discuss your testimony. Pretend you are still on the witness stand. We will come back at 1:40. Okay?

(Witness excused.)

THE COURT: And, do you want to meet at 1:40 and discuss a day to continue the rest of this? Or would you rather take a break later on in the day? Either way is fine.

MR. RAVENELL: Let's take a break later in the day, Your Honor. Let's see how far we go first.

THE COURT: Okay. Let's do that.

MS. ALBAN: Your Honor, however, at 1:40 would you like me to provide the Court, I can provide the Court with Ms. Costello's probation records that she intended to testify from. And I do have the juvenile file brought with the INR that I intend --.

THE COURT: All right. You want to just meet me in my Chambers then at 1:40 with all the materials we need to look at. The file and whatever else we have.

MS. ALBAN: Yes.

THE COURT: Okay.

MS. ALBAN: Would that be acceptable to the Court and Mr. Ravenell.

[35] MR. RAVENELL: That is fine with me.

MS. ALBAN: Okay. Thank you.

THE COURT: Okay. Then I will see you in Chambers at 1:40.

MS. ALBAN: Thank you.

(Luncheon recess was taken.)

[36] AFTERNOON SESSION

THE COURT: Okay. You may be seated. Whenever you are ready.

MR. RAVENELL: Thank you, Your Honor.

Whereupon,

WILLIAM JOHNS

was called as a witness by the State, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

CROSS EXAMINATION

BY MR. RAVENELL:

Q Good afternoon, Detective Johns.

A Good afternoon, sir.

Q Detective we have never met before. Is that correct?

A That's correct.

Q All right. Detective let me direct your attention back to October 26, 2002, in the early morning hours. If I understand correctly there was a warrant obtained for Mr. Blake

on October 25, 2002.

A Correct.

Q Okay. And that warrant was executed -- a search warrant as well was executed at his home on October 26, 2002?

A Yes, sir.

Q Okay. Did you participate in execution of the **[37]** arrest warrant and search warrant?

A I was at the scene. I was standing in front of the residence just watching the upstairs windows to make sure nobody came out.

Q And what time did you arrive at Mr. Blake's home?

A It was just a few minutes after 5:00 a.m.

Q Okay. Did you take any notes about what time it was?

A No, I did not.

Q Okay. After you arrived at Mr. Blake's home, or while you were there, did you have any contact with Mr. Blake at his home?

A No, I did not.

Q What did you do while you were at the home?

A I stood in the front yard while the team went into the front door and watched the upstairs windows.

Q Okay. And, did you then leave or did you go inside the home?

A Once it was secured -- no, I didn't go in. Once it was secured, I knew they brought him out and I saw them put him in a car and then I left.

Q Okay. You actually saw the detectives bring -- excuse me, the officers bring Mr. Blake out?

A Yes.

Q And when those officers brought Mr. Blake out of his **[38]** home, he was not wearing any shoes. Correct?

A I believe that's correct.

Q In fact he was not wearing any pants? Correct?

A He had on a pair of shorts.

Q In fact he had on underwear, correct?

A Boxer type shorts, yeah.

Q Okay. Boxer type underwear.

A I don't know if they're underwear or shorts. It was a boxer type garment.

Q Okay. He did not have on any pants. Correct?

A Correct.

Q He did not have on any shirt. Correct?

A I believe he had on a t-shirt.

Q He had on an undershirt. His underwear, right?

A I don't know if it was an undershirt. It was a t-shirt.

Q Okay. So, Mr. Blake is brought out and he has got on boxer type shorts and a t-shirt, undershirt, is what you recall.

A Correct.

Q What was the weather condition like on October 26, 2002 at 5:00 o'clock in the morning?

A I believe it was a little chilly. I don't believe it was -- it wasn't raining or anything like that. I believe it was a little chilly. It wasn't too bad.

[39] Q It was not raining?

A I specifically can't remember. I don't remember it raining because I was standing out there and I don't remember getting wet.

Q Had there bee [sic] a rain earlier? Prior to 5:00 o'clock in the morning.

A I don't recall.

Q Okay. And you said it was a little chilly. What do you describe as a little chilly? It was cold?

A No. I don't believe it was cold.

Q Approximately what were the temperatures, do you

recall?

A No, I don't recall. I'm just kind of going from that time of year. Normally it's not real cold. And I remember during the daytime the sun was out. I wasn't cold then. But I cannot specifically remember the temperature at that time.

Q Okay. Now, when Mr. Blake was brought out of the home and where was he taken?

A To a police vehicle.

Q And where was that police vehicle in relation to his home?

A In the front parking lot.

Q Okay. So he was walked from his home to the police vehicle.

[40] A Correct.

Q And handcuffed?

A I believe he was at that point.

Q So once he was taken and put inside a police vehicle, where did he go then?

A He was driven to the police station.

Q Did you accompany him to the police station?

A No. I was in a separate vehicle.

MR. RAVENELL: Can I have just a moment, Your Honor?

THE COURT: Sure.

(Pause.)

BY MR. RAVENELL:

Q Once Mister -- well, strike that. You then drove to the police station.

A Yes.

Q Traveling from Mr. Blake's home to the police station, how long did it take you?

A I don't know. I didn't record the times.

Q Well, I didn't ask you if you recorded it. Give me your approximation.

A A few minutes.

Q How far is Mr. Blake's home from the police station that he was taken?

A Three or four miles, maybe.

Q Okay. All right. So, in a few minutes you traveled **[41]** from his home to the police station.

A Correct.

Q All right. And when you arrived where was Mr.

Blake?

A He was in the intake room.

Q Okay. And where is that intake room in relation to --.

A It's on the lower level of the police department.

Q Okay. Did you or Mr. Blake arrive first?

A Mr. Blake was there before I was.

Q When you arrived was anyone with Mr. Blake? Any officers?

A I believe it was Officer Reese was still with him.

Q You say was still with him. When had Officer Reese first come into contact with Mr. Blake to your knowledge?

A He was the one who drove him to the station.

Q Okay. Was that a particular assignment for Officer Reese, or it just happened to land in his lap to be the one to drive Mr. Blake to the police station?

A I don't know if we specifically planned that out ahead of time or not. He accompanied us on the raid, but so did several other officers. I don't think we specifically said who would transport him. I just don't recall that.

Q How many officers accompanied you on the raid?

A Oh, I don't know that number right off hand.

[42] Q Do you have any records of any of this?

A (No audible response.)

Q ----.

A There are some records of who was there, the asset records and all of that. There were several, two or three other officers who came with us from patrol.

Q To the best of your recollection how many officers accompanied you to Mr. Blake's home on that morning, sir?

A Including the officers who went into the house?

Q Yes. Every police officer.

A I estimate maybe a dozen.

Q And how many of those dozens actually entered Mr. Blake's home?

A I believe five or six did.

Q Okay. And what were the others doing?

A The -- some were out back and some were out front.

Q Kind of surrounding the building.

A Right.

Q Now, let's go back to the police station. You arrived. You see Mr. Blake. Tell us about your first encounter with Mr. Blake. What happened?

A I walked into the room. I told him who I was. And told him that, you know, I don't remember if he was standing or sitting. But we were in the intake room and at that point I told him I was going to advise him of his rights.

[43] Q And how was he handcuffed at that time?

A I believe he already had the handcuffs taken off. Although, I can't specifically say for sure.

Q You don't have a clear recollection.

A Not of whether he was still handcuffed or not, no.

Q Okay. Now you indicated that Mr. Blake was Mirandaized [sic] by you. Is that correct?

A That's correct.

Q And you told Your Honor earlier that you and Corporal Hannon were the two present when he was Mirandaized [sic]. Correct?

A That's correct.

Q And State's Exhibit 1 --

MR. RAVENELL: May I approach, Your Honor.

THE COURT: Yes.

BY MR. RAVENELL:

Q This is the advise of rights form that was presented to Mr. Blake to sign. Is that correct?

A That's correct.

Q And, there is a time indicating what time that occurred.

A Yes. The time is 05:11 hours. 5:11 a.m.

Q 5:11 a.m. And, the indication was that Mr. Blake was actually arrested at his home at 5:08 a.m. Is that correct?

[44] A That's the recorded time, yes.

Q That's the recorded time. And that is the time you recorded in your reports as well. Correct?

A That's the time I wrote down, yes.

Q Right. So it took you about three minutes to travel from Mr. Blake's home to begin your Miranda warnings.

A Probably not. The time 5:08 comes from our dispatchers. When the officers go in, they tell the dispatcher they are doing that. Then we brought him out --.

Q When they go in where?

A Into the house on the search warrant. I am sorry. And then they come out with him. Someone would have advised him that he was under arrest. At that point they would record whatever time that their watch or clock said in the dispatch room.

Q Okay.

A And then when I get to the station and I begin to read the rights, I look at my watch. And I record that time.

Q So, you think it's probably more than three minutes from the time that he was actually arrested until he was actually -- you started Mirandaizing [sic] him.

A It probably was in reality more than three minutes.

Q And, when you gave those Miranda warnings to Mr. Blake, if I understand your testimony, Mr. Blake invoked his right to counsel. Is that correct?

[45] A That's correct.

Q And, in fact, you understood, from your earlier testimony, you told us about Officer Reese, that Mr. Blake, you understood that he had invoked his right to counsel and therefore you stopped questioning him. Is that correct?

A That's correct.

Q Now, on direct examination you indicated that it was Detective Hannon who placed Mr. Blake in his cell.

A Correct.

Q All right. Didn't you write a report earlier that indicated that it was you and Officer Reese who placed Mr. Blake in his cell?

A I don't recall that.

Q Do you have a copy of the investigative report that you authored?

A Yes.

Q Would you take that out, please.

A (Taking out report.)

Q If you would turn to page eight of your report, sir.

A (Reading.) Okay.

Q You have that at the bottom, sir. Do you see where it says, "Blake, the client, talked about the presence of a lawyer." Do you have that sentence?

A (Reading.) Yes.

Q Would you read the next sentence, sir?

[46] A It says, "I walked Blake back to a holding cell and was accompanied by Officer C. Reese."

Q Okay. Now, doesn't that indicate that it was actually you and Officer C. Reese who placed Blake in his cell, not Officer Hannon?

A It does seem to indicate that. However, that is not correct.

Q Well, it doesn't seem to indicate it, in fact, it does indicate that. Doesn't it?

MS. ALBAN: Objection.

THE COURT: Overruled.

BY MR. RAVENELL:

Q Sir?

A I am sorry. What was the question, sir?

Q It in fact does indicate that you and Officer Reese walked him to his cell and placed him in that holding cell.

A It does indicate that.

Q Okay. Now, someone took him to his cell. Either you and Officer Reese or Corporal Hannon actually took him and placed him in a cell. Correct?

A Correct.

Q Corporal Hannon was the person who had been with you during your advise of rights to Mr. Blake. Correct?

A Correct.

Q Okay. Now you have told us that at some point you **[47]** and Officer Reese did go to Mr. Blake's cell. Correct?

A Correct.

Q And if I understood your testimony on direct examination, you are not sure why Officer Reese accompanied you to Mr. Blake's cell.

A That's correct.

Q And if I recall your testimony earlier, his only involvement, Officer Reese's, was to transport Mr. Blake from his home to the police station.

A Correct.

Q And if I understood your testimony a little while ago, you are not even sure if that was planned out or whether it was just a task that fell to him by the luck of the draw, so to speak.

A Correct.

THE COURT: Okay. Can you excuse me one second, please. I have to sign something and I am going to miss something if I sign it without --.

MR. RAVENELL: I will wait.

(Pause.)

THE COURT: Okay. Go ahead, Mr. Ravenell.

MR. RAVENELL: Thank you, Your Honor.

THE COURT: All right. Would you mind repeating the last question, though.

MR. RAVENELL: Sure.

[48] BY MR. RAVENELL:

Q You have indicated that there was no plan that you recall of Officer Reese being assigned the task of transporting Mr. Blake from his home to the police station. Correct?

A Correct.

Q And as you told us a little while ago, you don't have

any recollection of why, whatever time it was, he happened to be accompanying you to Mr. Blake's cell. Correct?

A Correct.

Q All right. Now, this investigation had been going on for how long prior to October 26, 2002?

A Approximately a month.

Q Okay. What involvement had Officer Reese had in this case prior to October 26, 2002?

A To the best of my knowledge he had no involvement in it.

Q Okay. He was not -- he is not a detective.

A That's correct.

Q And, if you -- he had not been working, to your knowledge, in any respect on the -- Blake or the murder of Mr. Stratton [sic]. Is that correct? ---

A That's correct.

Q Okay. Now, how many officers were in the police station, in the immediate area where Mr. Blake was being held on October 26, 2002, shortly after he was placed in the cell?

[49] A There were very few officers around.

Q Okay. Do you recall how many?

A At any specific time?

Q At the time period that I just asked you about.

A Can you repeat the time --.

Q Yes. October --.

THE COURT: Are you talking about around his cell particularly? Or in the whole police --.

MR. RAVENELL: Yes.

BY MR. RAVENELL:

Q Around the area where his cell would be. October 26, 2002. He is placed in a holding cell at some point by at least either you and Officer Reese or Corporal Hannon.

A Correct.

Q Okay. How many officers are in the vicinity of that holding cell shortly after he is placed in the cell?

A I don't believe there are any there right after he was placed in the cell.

Q Okay.

A Several were coming and going at different times. But, at that moment I don't believe anybody was there.

Q Okay. Now, you have told us that sometime after Mr. Blake was placed in the cell that you and Officer Reese, now I think you said around 6:00 o'clock a.m., you and Officer Reese went back to his cell and that is when you gave **[50]** him a copy of the statement of charges. Correct?

A That's correct.

Q Okay. Now, you would agree that there is no particular reason to have Officer Reese accompany you to give a Defendant a copy of the statement of charges?

A It's not necessary, if that is what your question is.

Q No, it's not necessary. Do you agree?

A No, it's not necessary.

Q Okay. And, in fact, you were carrying the statement of charges. You were the one who authored that statement of charges. Correct?

A Correct.

Q All right. Now, you have indicated here today that this was around 6:00 a.m., when you gave Mr. Blake the statement of charges. But isn't it true that, in the report that you wrote earlier, you indicated that when you and Officer Reese placed Mr. Blake in the cell, that that was the time you gave him the statement of charges?

A Would you repeat the question.

Q Yes. Today you have told us that Mr. Blake was placed in the cell by Corporal Hannon at 5:25 a.m. And that then around 6:00 a.m., you and Officer Reese went back to his cell and that is when you gave him a copy of the statement of charges. Correct?

[51] A Correct.

Q But isn't it true that in a report that you authored earlier you in fact said that it was you and Officer Reese who accompanied Mr. Blake to the cell. And at that time you gave Mr. Blake a copy of the statement of charges?

A It doesn't say at that time I gave him.

Q Well, you read us a statement earlier. Let's do this. Would you read the statement again that you read for us earlier.

A (Reading.) "I walked right back to a holding cell and was accompanied by Officer C. Reese."

Q All right. What is the next sentence?

A "After Blake was in the holding cell, I handed him his copies of the charging document and outlined what the charges against him were."

Q Doesn't that suggest that those things all occurred at the same time?

A It does suggest that, yes.

Q Okay. In fact, this is a report that you wrote. Correct?

A Yes.

Q All right. Now you have told us about this outburst or comment that Officer Reese made to Mr. Blake. And you have told us that this was shocking and out of the blue and you didn't expect it. Is that correct?

[52] A Correct.

Q Okay. And this was the same Officer Reese who, quite frankly from what you have told us, you don't even know why he was there talking to Mr. Blake, even in the cell area. Correct?

A Correct.

Q Okay. So he just happened to tag along with you and just happened to blurt out some comment to Mr. Blake after Mr. Blake had requested counsel. Correct?

A That's correct.

Q Okay. And if I understand you correctly, after Mr. Blake is given these statement of charges -- and by the way, these statement of charges that were given to Mr. Blake tell him that he was facing the death penalty. Correct?

A I believe it does say that on there.

Q Oh, do you believe. Let's make sure. If you can't find it. Let me give you a copy. It will make it easier.

A Okay. I am sure it's in here somewhere.

Q I will be happy to ---.

MR. RAVENELL: Can I have this marked as Defense 1.

THE COURT: Okay.

MR. RAVENELL: I am sorry. Defense A.

BY MR. RAVENELL:

Q I am going to show you what is Defense A. It's a copy of the statement of charges for Leeander Blake. Correct?

[53] A Yes.

Q All right. And the penalty for the charge for first degree murder says what, sir?

A It says "death."

Q All right.

MR. RAVENELL: I would move Defense A into evidence, Your Honor.

THE COURT: Any objection?

MS. ALBAN: No objection.

THE COURT: All right. That is admitted.

(The document referred to was marked for identification as Defense Exhibit A and was received in evidence.)

BY MR. RAVENELL:

Q Now that we have this, I am going to let you finish getting your documents back together. Let me know when you are finished.

A Go ahead, sir.

THE COURT: Mr. Ravenell, I also want to let you

know we have a note in our jury. So in a minute I might have to interrupt you again to ask these lawyers what they want to do with this.

MR. RAVENELL: Fine, Your Honor.

BY MR. RAVENELL:

[54] Q Now, after -- or at the time that you gave Mr. Blake these statement of charges which indicated that he faced the death penalty, if I understand your testimony, Officer Reese then made a comment to Mr. Blake, "I bet you want to talk to..." Well, excuse me. "I bet you want to talk now, huh."

A Something to that effect, yes.

Q Well, let's get it right. Don't you have your statement. The offense report that you wrote?

A Yes.

Q Let's get it just right. Tell me what he said. I don't want to guess. Page nine, top first paragraph.

A (Reading.) The quote is "I bet you want to talk now, huh."

Q Okay. Describe his tone when he said that. Officer Reese's tone.

A I guess somewhat confrontational.

Q Somewhat confrontational. Tell us what you mean by somewhat confrontational.

A It appeared to be -- I don't know how to explain somewhat confrontational.

Q Use a voice tone.

A Bet you want to talk now, huh! It was similar to that.

Q Okay. Now, when you had been talking to Officer Reese prior to that -- well, strike that. When you **[55]** were walking back -- strike that too. Where were you prior to walking back into the cell with the statement of charges? The cellblock area.

A I had, after he was originally put back into the cellblock, I had gone out. I was talking to my supervisor. Letting him know what was going on. Getting updates. Trying to get him more information. So I had been outside, out back. I had also been in the downstairs section where the cellblock is. I had been back and forth.

Q Okay. Now, you have had those statements of charges since October 25th?

A Correct.

Q Okay. You didn't give them to Mr. Blake prior to asking him or giving him Miranda?

A That's correct.

Q You didn't give it to him while he was sitting there in the room when he said he wanted counsel.

A That's correct.

Q Okay. You waited until after he said he did not want to speak to you, some 30 minutes or so later you walked in with those statements of charges with Officer Reese in tow. Correct?

A Not with him in tow, no, that is incorrect.

Q All right. Bad choice of words. You walked in with him.

[56] A He followed me back there is how it went down.

Q Sounds like it was intent. Now, let me ask you this, when you and Officer Reese were walking back there, were you talking to each other?

A I don't recall. If we did, it wasn't about the case. It was just chit chat. I don't recall any specific conversation.

Q Okay. Let me understand that. You don't recall what you were saying, but what you definitely recall is that whatever it was, it wasn't about the case.

A Yeah. We weren't talking about the case.

Q Okay. Now, when you were speaking to Officer Reese whatever you were talking to him about, you agree that his voice was at a much lower tone than the tone he used when he spoke to Mr. Blake and said, "I bet you want to talk now, huh."

A Correct.

Q And if I understand you correctly, after this uninvited Officer Reese is back at Mr. Blake's cell and makes this comment, this shocks you and you are hurrying him out of

there. Get out. You got to get out of here. You can't do this. Something of that nature. Right?

A Correct.

Q And then 20 minutes later you go back in and what you are telling us is that Mr. Blake then says he wants to talk to you.

[57] A Yeah. It was a little bit longer than 20 minutes, but that's basically correct.

Q All right. Now you agree that prior to that, prior to Officer Reese's outburst, Mr. Blake had made it clear he didn't want to talk to you.

A That's correct.

Q And if I understand you correctly, other than giving him, him, Mr. Blake, the statement of charges and Officer Reese's outburst nothing else had happened with Mr. Blake prior to him telling you he wanted to speak to you.

A Correct.

Q Okay. Now let me ask you this. You said that Officer Reese made the comment, "I bet you want to talk now, huh." You would agree that that suggests that Officer Reese knew that Mr. Blake had refused to talk earlier. Right?

A Correct.

Q If Officer Reese was not involved in this case in any whatsoever, how did he happen to learn that Mr. Blake had refused to talk earlier?

A One of the other officers may have told him. He was hanging around the area. He was at the station, because he assisted on the raid.

Q But you didn't tell him. Right?

A I don't recall telling him.

Q Okay. But you do agree that that comment certainly **[58]** suggests that he knew Mr. Blake had chose, in fact, said he did
not want to speak to you all.

A Yes.

Q Okay. And if I understand correctly, it was Corporal Hannon who was in the room with you when Mr. Blake refused to speak. Correct?

A Correct.

Q So at that time, the only two officers who definitely would have known from first hand knowledge that Mr. Blake had refused to speak and asked for a lawyer would have been you and Corporal Hannon.

A At that moment, correct.

Q Right. On October 26, 2002, Mr. Blake was 17 years old. Correct?

A Correct.

Q You have told us that you are aware of prior contacts he had with the system and there were only two prior to

October 26, 2002. When I say the system, the criminal justice system.

A There's only two that I'm aware of.

Q Right. And the two that you are aware of occurred on July 29, 2001 and January 30, 2002. Correct?

A I do not know the dates.

Q See if I can help you out there. (Reading.) I am going to show you this document, sir, which I will have marked **[59]** as Defense 2 for identification.

THE COURT: Okay. While you are doing that. Let me call the other. All right, counsel can you come up here, please.

(Pause.)

THE COURT: Okay. I apologize.

MR. RAVENELL: No problem at all, Your Honor.

THE COURT: All right, Mr. Ravenell.

MR. RAVENELL: Thank you.

BY MR. RAVENELL:

Q Detective, let me show you what has been marked as Defense Exhibit B. See if it refreshes your recollection as to the date of the charges in the past of Mr. Blake.

A (Reading.)

Q And you agree that it was July 30, 2002 -- excuse me. July 29, 2001 and January 30, 2002 for those prior contacts?

A That's right.

(The document referred to was marked for identification as Defense Exhibit B.)

BY MR. RAVENELL:

Q Now, based on your investigation in this matter and the background of Mr. Blake, you would agree that these charges that Mr. Blake faced on October 26, 2002, were in the scheme of **[60]** things much more serious than the charges he faced in the past, from your investigation?

A That's correct.

Q And you would agree that he had never faced any charges that carried the potential for a death penalty in the past. Correct?

A To my knowledge he hasn't, yes.

Q Right. I am asking about your knowledge. Now, if I understood your testimony, and I think I did, but you will tell me if I didn't. You were concerned about Officer Reese's outburst would violate Mr. Blake's request for counsel prior to being questioned. Correct? And that's why you forced him out of there.

A Correct.

Q Okay. Now, you have said today that this encounter

and after the -- strike that. Around 6:00 o'clock, I think you said, is the time that you and the officer took these statement of charges and this outburst occurred. Correct?

A Correct.

Q Around 6:00 a.m. After you saw Mr. Blake at around 6:00 a.m., what was the next time that you encountered him?

A It was approximately, refer to my notes, I believe it was 6:28. That is correct, 6:28 a.m.

Q Okay. And, now you indicated that there was a sequence of checking on Mr. Blake while he was in the cell.

[61] A Yes.

Q And when one checks on Mr. Blake in the cell, you then sign a log indicating that you checked on him.

A That's correct.

Q. Okay. So each time you go in and check on him you sign that cell log showing that you did that.

A Yes.

Q Okay.

A The log -- let me correct that. You don't necessarily have to sign the log each time, but the log should be signed approximately every half hour.

Q Okay. All right. Now, when you went back in to check on Mr. Blake the second time, did you sign the log?

A At about 6:28?

Q Yes, at 6:28.

A I'd have to refer to the log to refresh my memory. I don't recall.

Q Okay. Do you have a copy of the log there?

A Yes, I do. (Reading.) No I did not.

Q Does the log that you have indicate that anyone checked on Mr. Blake at 6:28?

A It indicates that Sergeant Powell did.

Q Does it indicate that you were there with Sergeant Powell at 6:28?

A No, it doesn't.

[62] Q But you are telling us that you were back there at the same time as Sergeant Powell, 6:28, to give Mr. Blake his clothes.

A No. I'm not saying I was back there at the same time.

Q No, I said approximately the same time, sir. 6:28.

A I did not see Sergeant Powell, so obviously we weren't there at the same time. Again, we are probably dealing with the issue of two different watches.

Q Okay. Two different watches.

THE COURT: Two different what sir?

THE WITNESS: Watches.

BY MR. RAVENELL:

Q So also what we have is you are telling us that everyone's watches seem to be somewhat off here. No one has the same time.

A Correct.

Q Okay. If I understand you correctly at 6:28 a.m. you went in to take clothes to Mr. Blake and you said the clothes had just arrived at the police station.

A Correct.

Q I am sorry?

A That's correct.

Q Okay. So Mr. Blake arrived at the police station around 5:11 a.m. and his clothes didn't arrive until around **[63]** 6:28 a.m.

A That's correct.

Q Okay. You said that this cell was cold concrete.

A It's made out of concrete and steel and tends to get chilly, yes.

Q I think the term you used on direct examination was cold, not chilly, right?

A It tends to get cold there.

Q Okay. And on October 26, 2002, you wanted to get Mr. Blake his clothes because he is in this cold cell.

A That's right.

Q Concrete steel cell. All right. When you went in and you said that Mr. Blake then tells you that he wanted to speak to you or asked whether he could speak to you, did you ask him to [sic] caused him to change his mind?

A No. I don't believe I did.

Q You weren't interested?

A Oh, I was interested.

Q But you never asked.

A I didn't ask him any questions at that point.

Q Well, why --

A Well, correction. I didn't ask him that question.

Q At any time did you ask him what caused him to change his mind?

A No.

[64] Q Well, if you were interested, why didn't you ask?

A Didn't see it as relevant at that point.

Q Okay. You just had an outburst with one of your officers in front of him making threats, so to speak, and you didn't think it was relevant to ask him why he changed his mind.

MS. ALBAN: Objection.

THE COURT: Overruled.

THE WITNESS: Correct.

BY MR. RAVENELL:

Q Okay. You obviously don't know whether Officer Reese's comments had any impact on Mr. Blake changing his mind. Because you didn't ask.

A Correct.

Q Okay. Do you recall who brought you Mr. Blake's clothes?

A No, I do not.

Q The time period that Mr. Blake is -- well strike that. You told us that you took the clothes to him because you were concerned. He is in this cold cell. He is in it probably for at least an hour by the time you give him the clothes. He is in the police station at least 14, what, I guess 14/15 minutes prior to that from the 5:11 a.m. at least when the Miranda is given until 5:25 when he is put in the cell. Correct?

[65] A Correct.

Q And he is in the station a few minutes before that.

Correct?

A Correct.

Q Did you ever offer him anything else to put on? Any other clothes if you were so concerned.

A No, I did not.

Q Okay. Did you call to his mother's home which was three/four miles down the street and say, can you guys bring some clothes. This man is sitting here without clothes on.

A No. That has already been mentioned that someone was bringing -- going to bring -- excuse me. Was going to bring him clothes from the house. I already knew that.

Q All right. But we are now an hour and a half or so, close to, after his arrest and you didn't, even though you were concerned about him, you didn't try to hurry it along any way.

A I didn't call and ask about it further. I knew they were on the way.

Q All right. When you went back into Mr. Blake's cell on either your second or third occasion, when you tell us at 6:28, did -- isn't it true that you actually said to Mr. Blake, "Do you want to talk to us?"

A That's not true.

Q Not true.

A Correction. After he made his comment, I think **[66]**

asked him that, yes.

Q Okay. So, you said it. You are just telling us that he spoke first.

A That's correct.

Q Okay. Prior to, or did you know on October 26, 2002, did you know whether Mr. Blake had ever been advised of Miranda warnings prior to October 26, '02?

A I did not know.

Q Did you know on October 26, 2002, whether Mr. Blake had ever been interrogated by a police officer prior to October 26, 2002?

A No, I did not know at that time.

Q Prior to questioning Mr. Blake either the first time or the second time when you gave him Miranda warnings, did you contact his mother to see whether she would be available before you questioned him?

A No, I did not.

Q Now you had been to his home and you knew his mother was there. Correct?

A I did not know for a fact she was there. I kind of assumed she was there.

Q You didn't even check to see whether his mother was in the house.

A I did not go in the house, sir. No, sir.

Q I understand. You don't have to go in to check. **[67]** Did you check to see whether she was in the house?

A No, I did not.

Q Did you ask anyone to check?

A No, I did not.

Q Did you ask anyone whether she was there?

A No, I did not.

Q Did you ever offer Mr. Blake an opportunity to speak to his mother prior to questioning?

A No, I did not.

THE COURT: Okay. Wait a minute. You said you didn't check to see if she was there or, what was the other thing you said? Or ask anyone else if she was in there. Is that what you testified?

THE WITNESS: Yes.

THE COURT: Okay.

BY MR. RAVENELL:

Q Now, later on that morning you told us that Mr. Blake agreed to take a polygraph examination. Correct? Exam, correct?

A Correct.

Q But prior to administering that polygraph exam, you did check with his mother to get her consent and waiver.

A I didn't hear the question. I am sorry.

Q Yes or no. Did you check with his mother prior to having him take the polygraph to get her to sign a waiver?

[68] A Yes. She was told to come to the State Police Barracks.

Q She was told to come where? I am sorry, the door closed and I didn't hear.

A Yes. She was advised that that is what we were going to do. Take him over there. She came to the State Police Barracks.

Q Okay. Didn't you say a moment ago before that door closed she was told to come there?

A She was told that's what we were going to go there. So we asked her to go there. Yes.

Q Okay.

THE COURT: Asked her to go where, sir? To the Maryland State Police?

THE WITNESS: To the State Police Barracks, yes.

BY MR. RAVENELL:

Q Is that closer to her home or further away from her home than the police station where you initially had Mr. Blake?

A It's a little bit further.

Q So you called her to come to the State Police Barracks prior to doing a polygraph, but you didn't call her to come to the police station prior to questioning Mr. Blake.

A That's correct.

Q In addition to not just calling her to come to the Maryland State Police Barracks, you actually presented her with **[69]** a form for her to sign a waiver to allow Mr. Blake to be questioned and polygraphed. Correct?

A I did not do that, no.

Q Not you personally, but it was done.

A It was done.

Q It was done by the person you called in to do the polygraph examination.

A Correct.

Q Corporal White, correct?

A Correct.

Q Okay. If Mr. Blake had been a 27 year old adult, would you have asked his mother for permission to have him polygraphed?

A No.

Q So the reason you did it was because he was a minor, correct?

A Correct.

Q What did you tell Mr. Blake about a polygraph examination?

A I don't believe I told him anything about the polygraph examination. Other than we simply --.

Q You didn't explain it to him at all?

A I did not explain it to him, no.

Q So, you just -- I am sorry. You told us that he agreed to take a polygraph exam. Do you remember that?

[70] A Yes.

Q He didn't just walk up to you and say, Officer, I want to take a polygraph exam. Correct?

A Correct.

Q You told him or asked him about taking a polygraph.

A I asked if he was willing to take one, yes.

Q What else did you say about a polygraph when you said that to him, when you spoke to him about it?

A I believe I simply asked him if he knew what one was.

I didn't go into any other details.

Q You believe you asked him if he knew what one was.

A Yes.

Q Did you write any notes about your conversation with him regarding the polygraph?

A Not that specific question, no.

Q Okay. Do you recall telling me about if he passed this would help him?

A I don't specifically recall saying that.

Q You don't specifically recall telling the man that if he passed the polygraph it would help?

A I don't recall saying that, no.

Q Okay. Well, there was a long pause there. Why?

A I'm going through my memory trying to remember if I said that. I couldn't remember saying that.

Q You can't remember saying it today?

[71] A That's correct.

MR. RAVENELL: A moment, Your Honor.

THE COURT: Yes.

(Pause.)

MR. RAVENELL: Nothing further at this time, Your Honor.

THE COURT: Okay. Before you -- do you have any other questions?

MS. ALBAN: Yes, Your Honor.

THE COURT: Okay. I do have a question. Sir, you testified before about a period of time when you were speaking to Officer Reese, but you said you weren't talking about the case. When was that? I missed that.

THE WITNESS: He was referring to as we were walking back to the cellblock area, ma'am.

THE COURT: Well, was that he was put in the cell? I mean, immediately after he was placed in the cell? Is that what you were referring to?

THE WITNESS: He was placed in the cell originally at approximately 5:25. And I walked back there and Officer Reese followed me back there at approximately 6:00 a.m.

THE COURT: So, is that the time you are talking about? The time between 5:25 and 6:00 a.m. is when you were talking with Reese, but not about the case?

THE WITNESS: Well, not that whole time though. He [72] was referring specifically to our, I believe, from the time we walked from the intake area back to the cellblock area. Just that short little walk. As Reese followed me back to the cellblock area.

THE COURT: Okay. I am sorry. I am not getting it.

THE WITNESS: It would have been just a moment before 6:00 a.m.

THE COURT: Okay. So, the period between walking from where to the cellblock area, where were you?

THE WITNESS: I had been several places. I had been out back informing my supervisor what was going on ---.

THE COURT: But that is the period of time between 5:25 and 6:00 a.m. Right?

THE WITNESS: Yes.

THE COURT: Okay. So is that what the question was directed to was that your understanding between 5:25 and 6:00 a.m. is that the time you were speaking with Officer Reese at various times?

THE WITNESS: That was not my understanding of the question.

THE COURT: Okay. What did you think he was asking you when he asked were you talking to Officer Reese about the case. And you said, "I was talking to him, but not about the case."

THE WITNESS: I thought he was referring to [73] specifically just the moment before 6:00 a.m. as we were walking to the cellbock area.

THE COURT: Okay. Could we get a clarification on that?

MR. RAVENELL: Yes.

THE COURT: What were you talking about?

MR. RAVENELL: Your Honor, actually I was talking about both. I thought at different times.

THE COURT: Can you clarify that?

MR. RAVENELL: Yes, I would be happy to.

THE COURT: All right. Let me get that down.

BY MR. RAVENELL:

Q Let's deal first with the short period, when you were walking back to the cellblock with Officer Reese. If I understood you, you were talking, but you were not talking about the case. You and Officer Reese.

A I believe what I was referring to, we may have chatted.

Q Right.

A We may have said something to each other. But, we weren't specifically talking about the case at that time.

Q Okay. And between 5:25 and 6:00 o'clock, if I understand you correctly, you don't have any recollection of speaking to Officer Reese about the case at that time during that time period either.

[74] A That's correct.

Q Okay.

THE COURT: Okay. Thank you. All right. Ms. Alban, well let me ask the Clerk. Do we have another note?

THE CLERK: Yes.

THE COURT: All right. One second.

MR. RAVENELL: If I may just ask one question.

THE COURT: Sure.

(Pause.)

THE COURT: Are you thinking? Or are you --.

MR. RAVENELL: Oh, I am sorry. I thought you were writing. I was waiting for you actually. I apologize.

THE COURT: Oh, no. Okay.

BY MR. RAVENELL:

Q You said you have a cellblock log there that you were looking at. Does the cellblock log indicate Mr. Blake being taken out of the cell? You told us at 6:28 he told you he wanted to speak to you. Is there a notation that he was taken out of the cell at any particular time to be questioned by you?

A (Reading.) No there is no notation to that effect.

Q Okay. Now, when the Defendant is moved from the cell at any time, is it required that you log in the cellblock log movements of the Defendant?

A It's not a requirement, no.

[75] Q It's not required.

A No.

Q All right. So you just do it haphazardly. Do it if you want, don't do it if you --.

A No. The rule is that you are supposed to check on the person in the cellblock approximately every half hour and make sure it's noted in the log just for their well being.

Q Okay. Now, so it's about every half hour that you check on them.

A Approximately, yeah.

Q All right. Did you -- is there a notation of you checking on Mr. Blake at 6:00 o'clock and someone else checking on him five minutes later?

A That's correct.

Q Okay. So, that is not a half hour.

A That's correct.

MR. RAVENELL: Nothing further.

THE COURT: Okay. Why don't we go ahead and -- okay why don't you continue until the attorneys come in. We have a verdict in our case.

REDIRECT EXAMINATION

BY MS. ALBAN:

Q Detective Johns, you were asked several questions about the temperature as to what it was that evening. How long was the Defendant outside in the elements?

[76] A Less than a minute.

Q Okay. When would he have been outside?

A From the walk to his house to the police car and then again from the police car to the police station.

Q And then what would you, how would you characterize the temperature in the interview room? Or the booking room where you placed the Defendant?

A Room temperature. I don't know the degrees.

Q Okay. So, it would be fair to say that it was room temperature.

A Correct.

Q You were questioned about you weren't sure whether the Defendant had handcuffs on him when you first arrived in the interview room. Do you recall whether he had handcuffs on him while you conducted the questioning of, or the advisement of him?

A No, they were not on at that time.

Q So you took the handcuffs off for the advisement.

A They were off before the advisement. I don't recall if

they were off before I walked into the room and first met him.

Q Okay.

THE COURT: Okay. Why don't we stop there for a second.

(Whereupon, a brief recess was taken.)

[77] THE COURT: Do you want to just start?

MS. ALBAN: I will just start.

THE COURT: Okay. Well, let me just say this. We are back on the record on K-2002-2154 and K-2002-2417. Okay. Go ahead.

MS. ALBAN: Okay. Pamela Alban for the State.

Whereupon,

WILLIAM JOHNS

was called as a witness by the State, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

REDIRECT EXAMINATION (Resumed.)

BY MS. ALBAN:

Q Detective Johns, who put Mr. Blake in his cell initially?

A Corporal Hannon did.

Q And, when he was placed in his cell, were the statement of charges served on him at that time?

A No, they were not.

Q When were they served?

A At approximately 6:00 a.m.

Q Okay. When you went back at 6:00 a.m. to serve the statement of charges on him, did you intend to question him at that time?

A No, I did not.

[78] Q When Officer Reese made his comment, "Bet you want to talk to us now," had the Defendant had an occasion to read through the charging document, to your knowledge?

A No, there was not enough time.

MS. ALBAN: Your Honor, at this time, I need to have something marked.

THE COURT: All right. You will just have to wait a second.

(Pause.)

BY MS. ALBAN:

Q By this time you went back to speak with him -- oh, I am sorry. By the time you went back to deliver the clothes at 6:28, how long had it taken, how long had it been since the common since he had been delivered the statement of charges?

A I am sorry. Could you repeat the question?

Q I am sorry. When you went back at 6:28 to deliver the clothes, how long had the Defendant had with the statement of charges?

A Approximately 28 minutes.

Q Okay. I am going to show you what has been marked as State's Exhibit Number 6. I am going to ask you to review that.

A (Reading.)

Q What is that?

A It's a copy of the application I made for a **[79]** statement of charges.

Q Is that what you served on the Defendant at this time when you served the statement of charges on him?

A Yeah, this is only part of it, but yes.

Q In accordance with Defendant's Exhibit A, would that make it complete?

A Yes.

Q So that is what you handed to the Defendant to review in his cell.

A That's correct.

MS. ALBAN: Your Honor, the State would move to

have State's Exhibit Number 6 admitted.

THE COURT: Okay. Any objections, sir?

MR. RAVENELL: None, Your Honor.

THE COURT: Okay. It will be admitted.

MS. ALBAN: Thank you.

(The document referred to was marked for identification as State's Exhibit 6 and was received in evidence.)

BY MS. ALBAN:

Q You said that after Officer Reese made his comment you reported it to your supervisor. Is that correct?

A That's correct.

Q What did -- had you reported that the Defendant had **[80]** invoked his rights to your supervisor?

A Yes, I did.

Q And when did you report that?

A Shortly after we finished talking to him and he was placed in his cell, I went out and advised him.

Q So which time that he was placed in his cell?

A I am sorry. The original time that he was placed in his

cell, at 5:25. It would have been shortly after that.

Q Okay. And that is when you would have told your supervisor the Defendant had invoked his rights.

A Correct.

Q And where was your supervisor at that time? If you recall.

A I believe they were standing in the back lot of the police station.

THE COURT: In the what, sir?

THE WITNESS: The back lot of the police station.

THE COURT: Outside you mean?

THE WITNESS: Yes, ma'am.

BY MS. ALBAN:

Q Was your supervisor alone at that time when you reported that?

A I don't believe so. I believe there were several other detectives standing around.

Q Okay. When you arrested the Defendant, or when the **[81]** Defendant was placed under arrest, was there any other warrants that were executed at that time?

A Yes. A search and seizure warrant.

Q Okay. And where was that executed on?

A Mr. Blake's home.

Q Okay. And, is that where you placed the Defendant under arrest? Mr. Blake under arrest.

A I didn't. But that was where he was arrested, yes.

Q That was where he was arrested was at the home.

A Yes.

Q Okay. And when you went back to deliver the clothes was it your intention to question the Defendant?

A No, it was not.

Q Okay. In response to Defense questions, you indicated you did ask the Defendant, "Do you want to talk to me," but that was after the Defendant had --.

MR. RAVENELL: Objection to testifying by Ms. Alban.

THE COURT: I am sorry, what was your objection?

MR. RAVENELL: To her testifying.

THE COURT: All right. Rephrase your question.

MS. ALBAN: Absolutely.

BY MS. ALBAN:

Q When you went back to deliver the clothes, who spoke first?

A I believe I spoke to the effect of "Here's some **[82]** clothes for you."

Q Okay. And then who spoke next?

A Mr. Blake spoke next.

Q And what did he say?

A He made the comment, "I can talk to you now, right?"

Q And what did you say?

A I wanted to clarify what he was saying. I said, "Are you saying that you want to talk to me now?"

Q And what was his response?

A His response was, "Yes."

Q Did the Defendant at any time request to speak to his mother?

A No, he did not.

Q How much further was the MSP barracks from the Defendant's home than the police station?

A I'd say about less than half a mile.

Q Did you promise the Defendant any leniency if he would take a polygraph?

A No, I did not.

Q Did you promise that it would -- strike that. Did you promise him that you would go to bat for him if he took the polygraph?

[83] A No, I did not.

Q Did you make any promises to the Defendant in any way with regard to the polygraph?

A No, I did not.

MS. ALBAN: No further questions.

THE COURT: Anything based on those questions, Mr. Ravenell?

MR. RAVENELL: Your Honor, I do have one question and I ask for Your Honor for leave that it may be outside of that area for one question.

THE COURT: Okay. Well, we will wait and see what it is and if I get an objection.

MR. RAVENELL: Okay. I was waiting for you to say one thing.

THE COURT: I know. I was going to wait for you to ask and we will see if they have any objection.

MR. RAVENELL: Oh, okay. Sure.

RECROSS EXAMINATION

BY MR. RAVENELL:

Q You indicated at one point on direct examination, sir, that you, when you went in to take Mr. Blake his clothes, and Mr. Blake made a comment that he wanted to speak to you, that you then went out and put your gun up. And then brought him out to question him again. Does that mean that you had your gun on you when you went into the cellblock the second time to take the clothes?

A I believe I did at that point, yes.

Q All right.

[84] MR. RAVENELL: That is all the questions I have.

THE COURT: Okay.

MS. ALBAN: Your Honor, may I have just one quick follow-up?

THE COURT: Yes.

RE-REDIRECT EXAMINATION

BY MS. ALBAN:

Q Were you brandishing your gun towards the Defendant when you gave him the clothes?

A No, I was not.

Q Where was your gun specifically?

A In a holster on my hip as it is now.

Q Okay. Did you have your jacket on?

A I don't recall.

MS. ALBAN: No further questions.

MR. RAVENELL: Nothing further.

THE COURT: Okay. All right. Thank you very much, sir. We have a sequestration order, so please do not discuss your testimony with anyone.

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. You are excused.

(Witness excused.)

THE COURT: Okay. Would you like to call your next witness?

MS. ALBAN: Your Honor, it would be Corporal White.

[85] THE COURT: Okay.

Whereupon,

LLOYD EDWARD WHITE, JR.

was called as a witness by the State, having been first duly sworn, was examined and testified as follows:

THE CLERK: You may be seated. Please state your name and occupation. And spell your last name, please.

THE WITNESS: I am Corporal Lloyd Edward White, W-h-i-t-e. I am a Junior. I am currently employed by the Maryland State Police.

DIRECT EXAMINATION

BY MS. ALBAN:

Q How long have you been with the State police?

A Nine years, eight months.

Q Let me draw your attention specifically to October 26, 2002. Did you have occasion to come into contact with Leeander Blake?

A I did.

Q And do you see Mr. Blake in the Courtroom?

A I do. He is seated at the Defense counsel table.

MS. ALBAN: For the record, identifying the Defendant.

BY MS. ALBAN:

Q How did it come about that you had contact with Mr. Blake?

[86] A Detective Johns from Annapolis City Police Department called me to set up an appointment with him.

THE COURT: Sir, could you move your chair a little bit closer to the microphone so it will amplify your voice a little more. What did you say? Detective Johns called you, what?

THE WITNESS: In order to set up an interview with Mr. Blake.

BY MS. ALBAN:

Q You were going to administer a polygraph to Mr. Blake, correct?

A That's correct.

Q What time did you arrive at the barracks?

A Approximately 8:30 to 9:00 o'clock.

Q Okay. And where did you go specifically?

A Could you repeat the question?

Q I am sorry. What barracks did you go to?

A Oh, Barracks J, Annapolis Barracks on Taylor Avenue.

Q When you arrived, who did you meet with?

A I met with Detective Johns, Mr. Blake, Mr. Blake's mother.

Q Okay. And what did you do?

A I got -- Mr. Blake was a juvenile and I had his mother sign the polygraph request and release waiver.

Q Was Mr. Blake present when you had his mom do the [87] waiver?

A No, he was not.

Q Where was Mr. Blake?

A He was in the polygraph suite at that time.

THE COURT: He was where, sir?

THE WITNESS: In the polygraph suite in the barracks.

BY MS. ALBAN:

Q So where did you speak with Mr. Blake's mother?

A In the lobby of the barracks.

Q What did you talk -- what did you discuss with her?

A The actual form itself and what I was there to do.

Q I am going to show you what has been marked as State's Exhibit Number 3 and ask if you recognize what that is?

A I do. That's the polygraph request and release I was referring to.

(The document referred to was marked for identification as State's Exhibit 3.)

BY MS. ALBAN:

Q Okay. And, who did you discuss this with?

A Mrs. Pierce, Lawanda Pierce.

Q Okay. And, what did you do? How did you discuss it with her?

A I read the form to her word for word and then [88] basically explained the three larger paragraphs to her in plain words.

Q Did she appear to understand?

A Yes.

Q There is a signature on that form. Whose signature is -- there are a bunch of signatures on the form. Whose signatures are there?

A There's Lawanda Pierce. There's Leeander's. Detective Johns. Myself. And Trooper First Class Edward Eicher, who was also present in the lobby.

Q You have indicated that one was Ms. Pierce's signature. How do you know that?

A I witnessed her sign it.

Q Okay.

THE COURT: What was the last name? Edward what, sir?

THE WITNESS: Eicher, E-i-c-h-e-r.

THE COURT: Okay. Thank you.

THE WITNESS: Yes, ma'am.

BY MS. ALBAN:

Q And what function did Trooper Eicher serve?

A Actually he was just holding the door open because it locks behind us. And since he was there, I had him witness it also.

Q So he served as a witness for the form.

[89] A Yes.

Q Okay. Did you -- did Ms. Pierce indicate that she understood and was allowing her son to testify -- or why did you have Ms. Pierce, excuse me. Strike that. Why did you have Ms. Pierce sign the form?

A Simply because Leeander is a juvenile. And before I administer a polygraph test to a juvenile I need some type of parent or guardian signature on this form.

Q Okay. Was it the equivalent of a consent?

A Yes.

Q Okay.

MS. ALBAN: Your Honor, State would move to have State's Exhibit Number 3 admitted into evidence.

MR. RAVENELL: No objection.

THE COURT: All right. That is admitted.

(The document marked for identification as State's Exhibit 3 was received in evidence.)

BY MS. ALBAN:

Q You have indicated the Defendant was in a polygraph suite. Is that correct?

A That's correct.

Q Okay. Could you describe that to us?

A It's one room. However, it's divided into two **[90]** sections. One area, the interview room has my desk and several chairs and a file cabinet. The other room is the actual polygraph room itself. And that has a polygraph chair, my chair, a file cabinet and a desk for the instrument.

Q Do you know the approximate dimensions of the room?

A Each room is probably ten by ten.

Q Okay. Who was in that room with you and the Defendant?

A Detective Johns was during Miranda.

Q Okay. Did you introduce yourself to the Defendant?

A I did.

Q Okay. What did you say to him?

A I told him who I was and what I was there for.

Q And what did you specifically tell him?

A I told him I was Corporal White from the Maryland State Police. And I was there to administer a polygraph test to him.

Q Okay. Were you in uniform?

A No.

Q Okay. Did you have any weapons on you?

A No.

Q Prior to administering the polygraph, did you advise him of anything?

A His Miranda rights.

Q How did you advise him of those Miranda rights?

[91] A I read them to him. He was sitting to my left. I put the paper beside me and we both read at the same time.

Q What else did you do as you advised him?

A I asked him if he understood each of the five points on the Miranda form. He told me he did. I read the last paragraph. He told me that he understood. And then he signed the Miranda.

Q And what did that indicate?

A That he understood.

Q Did he indicate whether he wished to speak with you?

A Yes, he did.

Q And what did he indicate to you?

A He was very eager to speak with me.

Q Okay. Approximately what time was that time?

A 9:15/9:25 around that time.

Q I am going to show you what has been marked as State's Exhibit Number 4. And ask you if you recognize what that is?

A I do. That's the Miranda form I was just referring to.

Q Okay. And is that the form that you used with the Defendant?

A. It is.

Q And whose signature is located on the form?

A Myself and Mr. Blake's.

[92] MS. ALBAN: Your Honor, the State would move it to have it admitted into evidence.

MR. RAVENELL: No objection, Your Honor.

THE COURT: Okay. Exhibit 4 is admitted.

(The document referred to was marked for identification as State's Exhibit Number 4 and was received in evidence.)

BY MS. ALBAN:

Q What happened at this time?

A I basically asked Mr. Blake his version of what happened. I went over some pretest questions. Also a biographical data form. Pretest interview is what we call that.

Q Okay. Were you with Detective Johns at this point?

A No. Detective Johns right after the reading of the Miranda received a phone call and he did not come back into the room until the polygraph portion was over.

Q And, you indicated you obtained some pretest questions. What are the pretest questions?

A As far as his biographical data form? As far as the information that I got from him?

Q Which did you do first? What was the first step?

A The first step is the biographical data form.

Q Okay. What did you learn when you were going [93] through the biographical data form?

A That he was a Junior in high school. That he worked at T.J. Max.

Q Did he indicate what he had done at T.J. Max? What capacity?

A He told me he was sales, stock, and register. Basically did everything there.

Q Okay. Did he indicate his age to you?

A 17.

Q Did you ask him whether he was -- his physical condition?

A He was in fine physical condition. The only notation I have in my notes is that sometimes he has allergies and wheezes.

Q Did he seem to understand your questions?

A Yes.

Q Did he seem to -- could you describe your interaction with him?

A Comfortable, conversationally.

Q Could you describe the Defendant's demeanor?

A Eager to help is how I would describe him.

Q Did you ask him whether he had trouble with words that were spoken to him?

A Yes. He indicated, no, he did not.

Q And did he indicate whether he had trouble **[94]** expressing himself verbally?

A I asked him that. He indicated he did not.

Q At any time did you raise your voice with him?

A No.

Q After you had gotten a biographical data, what did you do?

A I asked him for his version of what we were there for.

Q Okay. And based on that, what did you do?

A I formulated test questions for the polygraph.

Q What did you do after you did that?

A Explained the polygraph to him. What I was going to attach to him. How it worked. How long he would be sitting in the chair.

Q Did he seem to understand your explanation?

A Yes.

Q Did there come a time that you did, in fact, administer that?

A There did, yes.

Q Approximately how long did the pretest period take?

A Approximately an hour.

Q And about how long would you say that the polygraph took?

A The actual examination itself?

Q Yes.

[95] A I can tell you -- (Reading.) 12 minutes.

Q At any time did he express any reservations?

A No.

Q What happened after the polygraph was administered?

A We administered the polygraph in the actual polygraph room of the polygraph suite. Both him and I went back to the interview portion of the polygraph suite. And I explained --.

Q Who else --

THE COURT: Okay. Wait a minute. I am confused now. Are you saying that you left the room? I didn't quite catch that.

THE WITNESS: Your Honor, it's one room.

THE COURT: Right.

THE WITNESS: The first room that we go in is my interview room, where my office is. The room within that, where there are no other doors, other than the door to go into

that from my office, is the actual polygraph room. The polygraph area. That's where we administer the test.

THE COURT: So you and the Defendant would both be in that part of the room during the test.

THE WITNESS: Yes, ma'am. Yes, Your Honor.

THE COURT: Okay. Now, did you just say you left the room? Or, did I get that wrong.

THE WITNESS: No. Both he and I left to go back to **[96]** the interview room.

THE COURT: Okay. Is the interview room that other part that is your office?

THE WITNESS: Yes.

THE COURT: Or is that a totally different room?

THE WITNESS: Yes. Yes.

THE COURT: Okay. That is what you mean by interview room?

THE WITNESS: Yes, ma'am. Yes, Your Honor.

BY MS. ALBAN:

Q Who was present in the interview room at this point?

A He and I were the only ones present from Miranda until the post-test.

Q Without discussing the results, what did you say to Mr. Blake?

A I told him that I did not believe his version of what he had told me earlier.

Q And what did he say?

A (No audible response.)

Q What else -- did you say anything else to him at that point?

A I asked him if he could offer any explanation to my basis of not believing him. And he did offer an explanation.

Q What did you do after he offered you that explanation?

[97] A I summonsed Detective Johns at that time.

Q What did you say to Detective Johns?

A I told him that Mr. Blake had additional information to give him in reference to this.

Q And what happened at that point?

A Detective Johns came into the room, the actual interview room, my office area. And Mr. Blake repeated what he had told me earlier. I asked him if that was all. He appeared resigned and then said no. And he added another detail.

Q Okay. What happened at that point?

A Detective Johns spoke with him for several more

minutes and took notes.

Q Was that the end of the interview?

A Yes.

Q Approximately how long would you say the entire process took?

A Approximately two and a half hours.

Q At any time did you threaten Mr. Blake?

A No.

Q At any time did you promise Mr. Blake anything?

A No.

Q At any time did you physically mistreat Mr. Blake?

A No.

MS. ALBAN: Court's indulgence.

THE COURT: Yes.

[98] (Pause.)

MS. ALBAN: Nothing further. Thank you.

THE COURT: Okay. Any cross examination?

MR. RAVENELL: Yes, please.

CROSS EXAMINATION

BY MR. RAVENELL:

Q Afternoon, Corporal White.

A Good afternoon, sir.

Q Corporal White, you indicated that prior to questioning Mr. Blake, and actually even doing this polygraph, that you spoke with his mother and had her sign a waiver form because Mr. Blake was a juvenile, a minor?

A I did.

Q Okay. And that is the policy of the State police?

A Yes, sir.

Q So, you have any juvenile, a minor, must have a waiver from a parent or guardian, but not an adult?

A But not an adult, I don't ---.

Q Right. An adult wouldn't need a mother or father to sign a waiver.

A No. It is the same waiver. But on the bottom of that waiver, sir, is where an adult --.

Q Let's make sure I am clear, because. If it were a 27 year old adult that you were going to give an exam to --

A They would not need a parent.

[99] Q -- they would need a parent or guardian to sign.

A That's right.

Q The particular reason is because this person is a juvenile. Under age.

A That's correct.

Q All right. Now, you indicated that his mother was present in the police barracks. And you met with her in the lobby. Is that correct?

A That's correct, sir.

Q Now at one point you said that you met with Detective Johns, Mr. Blake, and his mother. But you never met with those three people together.

A Not all in the same lobby, no. Detective Johns was actually in the hallway there. And Mr. Blake, I believe, was under supervision from another police officer.

Q Right. For example, you never had his mother in the same room with him.

A No.

Q And, in fact, when you later after you assessed the polygraph, you did not bring his mother in, Mr. Blake's mother in, when you questioned him.

A Certainly not.

Q Okay. All right. You say certainly not. Is there

something that prevents you from brining [sic] his mother in when you speak to him afterward?

[100] A My office is downstairs. And the lobby is upstairs.

Q Okay. And that prevents you from bringing his mother in that one is on a different floor?

A I prevent someone from coming in, certainly.

Q Okay. You prevented someone from coming in. Not the floors that they were on.

A Correct.

Q Obviously, if you wanted to, you could have gone upstairs or asked someone to go upstairs, call Detective Johns, as you did when you wanted to speak to Mr. Blake further, and say, look I am going to question him now. We are finished the polygraph examination and I am going to see if his mother wants to come in. You could have done that.

A Yes.

Q All right. You made a conscious decision not to do that.

A It did not enter my mind after the polygraph. I've never brought a parent into an interview room.

Q You just never do it. Nothing ever prevents you from doing it. You just don't do it.

A Correct.

Q Okay. Now, you said you explained to Mr. Blake how a polygraph works. Correct?

A I did.

Q Okay. And during the explanation of how a polygraph **[101]** worked, did Mr. Blake ever ask you whether this would help him?

A Did he ask me whether it would help him?

Q Yes. Taking this exam would help him.

A I don't recall.

Q You don't recall.

A No. Not if it would help him.

Q Okay. Now, you said you asked Mr. Blake some questions and you told us about some of the things you asked him. Did you ask him whether -- when he had last slept?

A (Reading.) I did.

Q And when did he tell you he had last slept?

A He had told me the day prior that he had had a nap and that he had slept last night until 4:30 in the morning when he was awakened by police.

Q In fact, didn't he say he had no sleep.

A No. He told me he had no sleep since 4:30.

Q And he told you he had slept until 4:30 in the morning.

A That's correct.

Q Do you have a note of that?

A It's my biographical data sheet, yes, sir.

Q Well, what does your biographical data sheet show, sir?

A (Reading.) "What time did you go to bed? Nap, yesterday. What time did you go to sleep. Until 4:30." It **[102]** says, "Did you sleep soundly?" I don't have anything written after that. And then I have "no sleep" written after that.

Q Well, in fact, what you have written is "Nap, yesterday. 4:30. No sleep." Correct?

A In my handwriting, yes.

Q Okay. So, you don't have anything that says I slept until 4:30 this morning and got up.

A No.

MS. ALBAN: Objection, Your Honor. He has already indicated what he wrote down and what the answer was. And this has been asked. And he has basically told the Court what is on the sheet. He has indicated what was told to him.

THE COURT: All right. Sustained.

BY MR. RAVENELL:

Q Did you ask Mr. Blake whether he had any alcohol to

drink?

A I did.

Q And did you ask him when he last had alcohol?

A He told me between 10:00 and 11:00 p.m. the night prior that he had a sip of alcohol.

Q Okay. Now, did you ask Mr. Blake whether he had used any drugs?

A I did.

[103] Q Did you ask him whether he smoked marijuana?

A I did.

Q Did he tell you how often he smokes marijuana?

A He told me often. Often. He did not [sic] be more specific than that.

Q Did you ask him whether he used any other drugs?

A I did.

Q Did you ask him whether he ever used PCP?

A Yes.

Q And what did he tell you?

A Six times in his life.

Q Did you ask him whether he ever used Ecstacy?

A Yes. Again, six times.

Q Now you told us that your [sic] brought -- after the examination was done, you brought Mr. Blake in and you questioned him. And after some responses he gave you called Detective Johns in. And Detective Johns came in. Mr. Blake repeated some statements to Detective Johns. And Detective Johns took some notes.

A Uh-huh.

Q Okay. Were you present when those notes were being taken?

A Yes.

Q [D]id you ever review those notes?

A No, sir.

MR. RAVENELL: Nothing further, Your Honor.

THE COURT: Anything else, Ms. Alban?

[104] MS. ALBAN: Just briefly.

REDIRECT EXAMINATION

BY MS. ALBAN:

Q As an adult talking [sic] the polygraph test, does one exercise a waiver?

A Yes.

Q So if I were willing to take a polygraph, I would have to sign a waiver.

A Certainly.

Q Okay. But as a juvenile, the parent must sign the waiver.

A Yes.

Q Okay. Did the Defendant at any time ask to see his mother?

A No, he did not.

Q Did you at any time promise that if the Defendant took this polygraph that he would receive leniency from the Court?

A No.

Q Did you at any time promise him that you would go to bat for him if he took this polygraph?

A No.

Q Did you promise him any benefit if he had taken this polygraph?

A No.

[105] Q Did the Defendant indicate whether he had taken any drugs prior to, in close proximity to this polygraph being administered?

A He indicated that he did not, other than a sip of alcohol the night prior.

MS. ALBAN: No further questions.

THE COURT: Anything based on those questions, sir?

MR. RAVENELL: No, Your Honor.

THE COURT: All right. Thank you, sir.

THE WITNESS: Thank you, Your Honor.

THE COURT: I am ordering you not to discuss your testimony with anyone. Okay?

THE WITNESS: Yes, Your Honor.

THE COURT: All right. You are excused.

(Witness excused.)

MS. ALBAN: Your Honor, before I can call my next witness I need the Court to sign the appropriate relief that I asked for. It's my understanding that Ms. Costello cannot testify unless that order is signed.

THE COURT: Okay.

MS. ALBAN: I would need a copy to fax over.

THE COURT: Do you have a release here?

MS. ALBAN: Basically, I have an order.

THE COURT: Is it the order?

MS. ALBAN: Yes, please. I will abide by the **[106]** parameters.

THE COURT: Okay. But, --- say qualified by what we talked about in Chambers.

MS. ALBAN: Yes.

THE COURT: Also, it's quarter of four now. I was wondering how many more witnesses you have and at what time, if you think we won't finish this evening, you would like to go back. We have to go back to ask assignment for a new date before 4:30, because they will be gone. If you think we will finish by 5:30.

MR. RAVENELL: We aren't going to finish.

THE COURT: Excuse me?

MR. RAVENELL: I don't think we will finish.

THE COURT: You don't think we will. Okay. Would yo [sic] like to take a break right now and get your new date?

MS. ALBAN: That would be fine with the State. I mean, the other witness we would do by stipulation. So it's an appropriate time to take it.

THE COURT: Okay. Why don't you go ahead back with my secretary and she will get you a new date. All right. Ms. Alban the order is signed.

MS. ALBAN: Thank you very much.

(Whereupon, a brief recess was taken.)

THE COURT: All right. You can be seated. Okay. Go ahead, Ms. Alban.

[107] MS. ALBAN: Your Honor, we would be calling Mary Ann Costello to the stand.

Whereupon,

MARY ANN COSTELLO

was called as a witness by the State, having been first duly sworn, was examined and testified as follows:

THE CLERK: You may be seated. Please state your name and occupation. And then spell your last name for the record, please.

THE WITNESS: My name is Mary Ann Costello. I am employed at the Department of Juvenile Justice as a juvenile counselor four. My last name is spelled C-o-s-t-e-l-l-o.

DIRECT EXAMINATION

BY MS. ALBAN:

Q How long have you been employed with the Department of Juvenile Justice?

A 15 years.

Q During that employment did you have occasion to supervise Leeander Blake?

A I did.

Q And in what capacity did you have contact with him?

A I was his probation officer.

Q Okay. Do you see him in the Courtroom today?

A I do.

Q Would you identify him for the Court.

[108] A Yes. He's seated in the table and has on a blue shirt.

MS. ALBAN: For the record, the Defendant.

THE COURT: Okay.

BY MS. ALBAN:

Q How long did you supervise Mr. Blake?

A It was from March 1st when he was placed on probation, March 1, 2002, until his case was rescinded on August 23, 2002.

Q During that probationary period, did you know whether the Defendant was in school?

A Yes. He attended Annapolis Senior High School.

Q Were you aware of the Defendant having any learning disabilities?

A No.

Q Did the Defendant appear to understand you when you met with him?

A Yes.

Q Did the Defendant appear to understand the rules of probation?

A Yes.

Q And how did he do on probation?

A He did very well on probation. He completed the community service hours he was directed to do. He remained in school and in good standing in school. He attended substance **[109]** abuse counseling. And actually when he completed his first weeks, I think it was 23 or 26 required in the program, he opted to continue because he felt he was getting a lot out of the program.

He reported as he was told. And he was always very courteous and polite and would answer questions and volunteer information whenever we had meetings.

Q Do you know whether he was employed while he was on probation.

A Yes. He had several different jobs. At one time he worked at Subway. And just, I think in the Spring of 2002, went to T.J. Max.

THE COURT: Okay. I am sorry. Worked at where, first?

THE WITNESS: Subway.

THE COURT: Subway and then T.J. Max.

THE WITNESS: Yes.

THE COURT: Thank you.

BY MS. ALBAN:

Q You indicated that the Defendant was in school. Were you aware whether he was receiving a special education during that school?

A We had sent for school records and never received them. But to my knowledge from my visits to school, I don't think he was in Special Ed.

[110] Q Did he -- was he able to read and write?

A I never asked him to demonstrate, but I would assume if he was in almost 12th grade that he would be able to.

Q And in your contact with him, did he have a learning disability. Was it apparent to you?

A No. He presented as an intelligent polite young man.

Q Did you know, what was his date of birth?

A I have a birth certificate of June 1, 1985.

Q Thank you very much.

THE COURT: Any cross, sir?

MR. RAVENELL: Yes, Your Honor.

CROSS EXAMINATION

BY MR. RAVENELL:

Q Good afternoon, Ms. Costello.

A Good afternoon.

Q So you had the opportunity to supervise Leeander for about seven and a half/eight months.

A From March until August, what is that? About five months.

Q About five months.

A Five months.

Q And as his probation agent, you had the opportunity to speak to him on numerous times, numerous occasions.

A Yes.

[111] Q You had the opportunity to let him know what was expected of him as being a probationary, correct?

A Yes.

Q And during this time period he began to listen to you. Correct?

A Yes.

Q He followed your rules.

A Yes.

Q He followed your regulations.

A Yes.

Q He had respect for your authority, didn't he?

A He did, yes.

Q He was very good and honest, truthful young man wasn't he?

A He was.

MR. RAVENELL: Nothing further, Your Honor.

THE COURT: Okay. Anything based on his questions?

MS. ALBAN: No, Your Honor.

THE COURT: All right. Thank you very much ma'am. Ma'am, I am ordering you not to discuss your testimony with anyone.

(Witness excused.)

THE COURT: Do you want to call your next witness?

MS. ALBAN: Your Honor, the only thing that we would have remaining would be the stipulation. It is my **[112]** understanding we have an agreed stipulation that the State

would have called Jennifer Beard of the Department of Parole and Probation to indicate that she had -- I am sorry. Juvenile Justice Department. That she had completed an investigation and report on February 27, 2002, for case J-2001-1646. And in that she --.

THE COURT: J-2001-what? 1646?

MS. ALBAN: 1646. Yes.

THE COURT: Okay. Thank you.

MS. ALBAN: And in that she reported that the Defendant did not receive any special education classes. That Leeander wants to become an electrician and to go to college. That his mother and he both believe that he is an intelligent youth who can succeed when he chooses.

She also indicated that Leeander had three jobs in the past year. I think that completes our stipulation.

MR. RAVENELL: That is correct, Your Honor.

THE COURT: Okay. Three jobs in the last year. All right. I was trying to keep up with you, but I couldn't make it.

MS. ALBAN: Oh, I am sorry.

THE COURT: After Defendant did not receive any special education he indicated he wants to be an electrician and go to college. What was the next sentence?

MS. ALBAN: Okay. His mother and he both believe **[113]** that he is an intelligent youth who can succeed when he chooses.

THE COURT: Okay. Thank you.

MS. ALBAN: I apologize for going too quickly.

THE COURT: That is okay. All right. And that is correct as you said.

MR. RAVENELL: (No audible response.)

THE COURT: All right. Would you like to put on any other evidence?

MS. ALBAN: That would be the State's evidence at this time.

THE COURT: All right. Mr. Ravenell.

MR. RAVENELL: Your Honor, I have had some discussions with the State. We don't believe that we would finish. Mr. Blake would probably testify. It would be very lengthy. I don't want to break him up in the middle of his examination. I would ask the Court just to let us continue or start the Defense case when we come back on Friday.

THE COURT: Okay. Do you have any other witnesses that you know of?

MR. RAVENELL: I anticipate calling Officer Reese. Maybe we will get him on today.

THE COURT: I was going to say. Do you want to call him now?

MR. RAVENELL: We can at least get Reese done.

Yes. **[114]** We can call Officer Reese since he is here.

THE COURT: Okay. Why don't you do that.

Whereupon,

CURTIS REESE

was called as a witness by the Defendant, having been duly worn [sic], was examined, and testified as follows:

THE CLERK: You may be seated. Please state your name and your occupation. And spell your last name, please, for the record.

THE WITNESS: Officer Curtis Reese, R-e-e-s-e. Assigned to the patrol division, shift five, Annapolis City Police Department.

THE COURT: Mr. Ravenell.

MR. BATES: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. BATES:

Q Good afternoon, Officer Reese.

A Good afternoon.

Q Officer Reese, you don't know me, do you?

A No, sir.

Q We have never met, have we?

A No, sir.

Q We have never had a conversation.

A No, sir.

Q Officer Reese, if I can take you back to October 26, **[115]** 2002. Do you remember that day?

A Yes, sir.

Q And, how do you remember that day?

A I was working our patrol division, the midnight shift.

Q And did you have a call or were you told to do anything that evening?

A Yes. I was asked to assist with a search and seizure warrant.

Q Do you remember where the search and seizure warrant was? To what location?

A Yes. 1376 Tyler Avenue.

Q And what was going to be your job in the assistance of that?

A When I responded there, I was just a patrol unit to be out in the area.

Q And do you remember the weather that evening?

A Not off hand. It was dark. I couldn't tell if it -- remember if it was raining or not.

Q Do you -- once you arrived, around what time did you arrive at 1376 Tyler Avenue?

A Approximately 5:08.

Q 5:08. And how do you know it was at 5:08?

A That's what the time I remember my report saying.

Q And is that what you looked at just then?

[116] A Yes, sir.

Q Did you need to look at your report or did you have independent recollection of your own time period that you arrived there?

A I had to look at my report.

Q Okay. How many officers were part of this team? The search and seizure warrant team.

A I can't recall. It was the Annapolis City Asset SWAT team.

Q And what did you know, or what did you think you were supposed to do?

A (No audible response.)

Q What did you know your job to be as being a member of this team?

A I was standing by holding a post on the perimeter.

THE COURT: I am sorry, I couldn't understand you. You were standing by for what?

THE WITNESS: I was holding the post on the perimeter. A fixed position on the perimeter of the residence.

BY MR. BATES:

Q And what did that entail?

A Stationery post position at the rear of the residence to make sure nobody leave [sic] running out the rear.

Q And, when you arrived at that house, how many officers were there?

[117] A I remember seeing approximately maybe five.

Q And do you know Detective Johns?

A Yes.

Q Was he there?

A I can't recall seeing him there.

Q Do you remember anyone going into 1376 Tyler Avenue?

A The emergency response team went through.

Q Did you go in?

A No, sir.

Q And did you see them go in?

A No, sir.

Q Do you know if they kicked the door down?

A No, sir.

Q Once they went into that location, what happened? What did your job become at that time?

A Approximately minutes later, I responded back to my patrol vehicle and I was assisting transporting the subject to the station.

Q When you say a subject, who are you talking about?

A Prisoner.

Q Prisoner. And do you see this individual that you transported in the Courtroom?

A Yes, sir.

Q Would you go ahead and point him out, sir.

A To the left of the Defense table, blue shirt on and [118] a tie.

MR. BATES: Your Honor, please let the record reflect that he is pointing out.

THE COURT: Okay. Thank you.

MR. BATES: Thank you, Your Honor.

BY MR. BATES:

Q And, when you say you transported him, were you already in your vehicle?

A No, I responded back to my vehicle.

Q Was he in your vehicle? Was he waiting for you?

A No, sir.

Q So, did you walk Mr. Blake to the vehicle?

A I assisted him with another detective.

Q What did Mr. Blake have on that evening?

A I believe he had on boxer shorts and a t-shirt.

Q T-shirt, like a tank top.

A No, like a regular pull over white t-shirt.

Q And his boxer shorts sort of like underwear.

A Yes, sir.

Q Do you know if he had on his shoes?

A No, sir.

Q And, he had just come from his house, correct?

A Where ever, where he came out of where the warrant was served at.

Q And, once you walked him to your car, what, if **[119]** anything, did you do?

A I was assisted by one of the Annapolis detectives and he was placed in my vehicle.

Q Who was in your vehicle with you?

A I believe it was Officer Sexton.

Q And, in your vehicle, what did you do next?

A Transported the individual to the Annapolis Police Station.

Q And about how long did that take you?

A Maybe three minutes.

Q Maybe three minutes. About how far from this house to Annapolis Police Station were you? How many miles.

A Maybe two and a half miles.

Q Two and a half. And that took you three minutes.

A (No audible response.)

Q And when you arrived there, what, if anything, did you do?

A I turned him over to detectives at the station.

Q That is when you turned him over to Detective Johns.

A Yes.

Q He was at the station waiting for you.

A Yes.

Q And do you know around what time this was?

A No, I do not.

Q At any time when you were in the car with Mr. Blake, **[120]** did he talk to you?

A No, sir.

Q Did you talk to him?

A No, sir.

Q Do you know if any time the officers at any time picked Mr. Blake's clothing up?

A No, sir.

Q Once you drew up to the police station, what did you do? When you turned him over to Detective Johns, what did you do?

A I cleared.

Q You cleared. What do you mean by that?

A I hold myself 1080.

Q I am sorry. I don't know what that means.

A There's a 10 code unit meaning I was available to any other calls if anything came out.

Q So were you physically in the police station?

A Yes.

Q So you just more or less sat around waiting for another call?

A Correct.

Q And where were you sitting around?

A I was in the dispatch.

Q Do you know if -- do you know where Mr. Blake went at that time period? Where the detectives took Mr. Blake?

[121] A I left him with the detectives in the booking area.

Q Okay. And do you know where they took Mr. Blake at that time?

A No, sir.

Q Did you know if Mr. Blake ever went to an interview room to be interviewed by the detectives?

A That's where I left him. That's called the booking area.

Q Oh, okay. Thank you. And you left him with Detective Johns.

A Correct.

Q Do you know around what time period this was?

A No, I do not.

Q Okay. Let's take this for a second. You arrived at the house around what time?

A Approximately -- I dispatched around 5:08 or so.

Q And how long would you say you were at that house before you got in the car with Mr. Blake?

A Maybe five or ten minutes or so.

Q So, around what time period do you think that is?

A Approximately quarter after 5:00, or 20 after.

Q And then it took you what? About three or four to five minutes to drive --

A Correct.

Q And it took Mr. Blake, what, another three, four, **[122]** five minutes to get to the interview room, the dispatch room, I believe you called it. Correct?

A No. Mr. Blake didn't go to the dispatch room.

Q Mr. Blake went to the interview room. Correct?

A Where I dropped him off. In our booking area.

Q In the booking area. Right. With Detective Johns.

A Right.

Q And how long did this take?

A It was immediately. About two minutes.

Q So, would you say Mr. Blake probably arrived there around what time?

A Maybe around 5:25.

Q 5:25, okay. And did you have an occasion to come across Mr. Blake anymore that morning?

A Yes.

Q And around what time period was that?

A Maybe approximately 6:00 o'clock or so.

Q And when you came across Mr. Blake around 6:00 o'clock, in what capacity was that?

A That was a request by my supervisor to do a frequent check. Cellblock check.

Q Requested by your supervisor. Who was your supervisor?

A Sergeant Karen Powell.

Q And she requested for you to do a frequent check on **[123]** a cellblock.

A Yes.

Q And what did that consist of?

A Make sure that the prisoner was in his cellblock awake or physically alive.

Q So Mr. Blake was no longer in an interview room at this time period. Correct?

A Correct.

Q And, do you know how Mr. Blake got to this cellblock?

A I don't know how he got there, no.

Q You didn't take him there?

A No.

Q When you went to check on him at 6:00 o'clock, you said, correct.

A Correct.

Q Did anyone go with you?

A No.

Q You were by yourself.

A Yes.

Q And when you went there by yourself, what, if anything, did you do? What, if anything, did you say to Mr. Blake?

A I just went back to his cellblock and checked.

Q Did you speak to him? Did you look at him?

[124] A I saw him.

Q And what, if anything, happened?

A He spoke to me.

Q Okay. What did Mr. Blake say to you?

A He said, "I want to talk to someone."

Q And what, if anything, did you do?

A I asked him who did he want to talk to.

Q And then what happened?

A He stated, "The detectives."

Q And then what did you do with that information?

A At that time I didn't do anything with it.

Q You kept it to yourself.

A Yes. I was still at the cellblock.

Q And then what did you do with that information after

you left the cellblock?

A Well, at that point, Detective Johns yelled out and said he requested to talk to his attorney.

Q Okay.

THE COURT: I am sorry. What was that again, sir?

THE WITNESS: At that point Detective Johns yelled out to this officer and stated that he requested to talk to an attorney.

THE COURT: At that time, wait a minute. Detective Johns yelled out.

THE WITNESS: Yes.

[125] THE COURT: Yelled out of where?

THE WITNESS: At the cellblock. At the holding, booking area.

THE COURT: Okay. I am sorry. Repeat that again. What did Detective Johns say?

THE WITNESS: He yelled out to -- he shouted to this officer, said the Defendant requested to have a lawyer.

THE COURT: Yelled out to this officer, meaning you?

THE WITNESS: Yes, ma'am.

THE COURT: Oh, okay.

BY MR. BATES:

Q So, I guess at first you went in the cellblock by yourself. And then Detective Johns must have opened the door.

A No. We could visually see each other.

Q There is a little window.

A Correct.

Q Okay. And Detective Johns was on the other side of that window.

A Correct.

Q Not in the cellblock.

A No.

MR. BATES: Court's indulgence.

THE COURT: Yes.

(Pause.)

BY MR. BATES:

[126] Q So when Detective Johns said this to you, what, if anything, did you do?

A I immediately left the cellblock area. And Detective Johns, he didn't push you out of the cellblock area, did he?

A No. We weren't even in close proximity to each other.

Q Oh, okay. So, basically he told this to you. You just walked on your own free will, correct?

A Correct.

Q So, Detective Johns, his voice must have been raised then to tell you this for it to go through --.

A It's a hollow area, the cellblock. You can hear between the booking area and the cellblock area.

Q So, I mean, about how loud was Detective Johns? Could you demonstrate?

A He shouted out.

Q He shouted it out.

A Right.

Q Could you demonstrate for me, please, sir? I mean, I am sorry, Officer.

MR. PAONE: Objection.

THE COURT: What is your objection?

MR. PAONE: He is skewing it in a mike. He can't possibly reproduce.

[127] THE COURT: All right. Well you can stand to the side.

THE WITNESS: He requested to talk to a lawyer.

BY MR. BATES:

Q Do you know once Detective Johns said that to you, did you see Detective Johns go into the cellblock?

A No, he did not.

Q You never saw Detective Johns hand Mr. Blake anything. Did you?

A No.

Q And after you left the cell room, cellblock, what did you do next?

A I was getting ready to clear the station.

Q When you went to the cellblock and you saw Mr. Blake, was he still in his t-shirt and his boxer underwear?

A I cannot recall.

Q Did you check on Mr. Blake anymore?

A No, sir.

Q Did you have an occasion to write all this information down?

A Yes.

Q And you put together a statement.

A I did a report, yes.

Q You did a report.

MR. BATES: Your Honor, at this time may I please [128] approach the witness? We would like to have this identified -- marked for purposes of identification as C.

THE COURT: All right.

MR. BATES: Your Honor, may I have leave to approach the witness?

THE COURT: Sure. What Exhibit number is that now, C?

MR. BATES: C, yes.

BY MR. BATES:

Q Officer, I am showing you an item that has been marked Defense Exhibit C. Do you recognize that item?

A Yes, I do.

Q What is that item?

A It's a copy of my report.

Q But it's a copy of a report that you generated, correct?

A Correct.

(The document referred to was marked for identification as Defendant's Exhibit C.)

BY MR. BATES:

Q It's a copy of a report that you produced, correct?

A Correct.

Q A copy of a report that you produced on your own independent recollection.

[129] A That's correct.

Q And when did you generate that report?

A Approximately a couple of months ago.

Q Okay. A couple of months ago. What date a couple of months ago?

A I can't recall the exact date.

Q Go ahead and look. It says, has a place right there for the date. What does it say on there? Does it have the date on that report?

A Yes.

Q And what is the date on that report?

A April 9, 2003.

Q Officer Reese, you said this report was generated April 9, 2003.

A Correct.

Q And this incident in which you had contact with Mr. Blake took place October 26, 2002. Correct?

A Correct.

Q Why didn't you generate a report before April 9, 2003?

MR. PAONE: Objection.

THE COURT: What is the objection?

MR. PAONE: Relevance.

THE COURT: Okay. Overruled. I think it goes to his memory. Overruled.

[130] BY MR. BATES:

Q You may answer, Officer.

A Can you repeat your question?

Q Why didn't you generate a report before April 9, 2003?

A Because I didn't know a report was required of me.

Q But a report was required of you and therefore that is why you put one together?

A No.

Q Why did you put one together?

A I was asked to put one together.

Q By who?

A The State's Attorney.

MR. BATES: Your Honor, at this time, may I please approach the Court to have what we would like to have marked for identification as Defendant's Exhibit D. May I approach the witness?

THE COURT: Yes.

BY MR. BATES:

Q Officer Reese, I am showing you an item that has been marked for identification as Defense Exhibit D. Do you recognize that item?

A Yes, I do.

Q What is that item?

A Cellblock check log.

[131] (The document referred to was marked for identification as Defendant's Exhibit D.)

BY MR. BATES:

Q And --- cellblock check log. What exactly is that?

A That's when the officer or supervisor makes frequent checks on the cellblock before and after tour duty or if there's any prisoners in the cell.

Q And when you make cellblock checks you are supposed to log in when the prisoner is placed in a cell and when a prisoner is taken out of the cell.

A Correct.

Q You basically login everything that happens in reference to this prisoner. Correct?

A Correct.

Q And that is what you are asked to do and that is your job has to do. Correct?

A On occasions.

Q You recognize that cellblock log, correct?

A Correct.

Q And does it have the time period in which various officers have looked in on the prisoners?

A Correct.

Q And who was the prisoner they were looking in on?

A It just says cellblock where they was placed at.

[132] Q What does that cellblock reference, Leeander Blake?

A It could be, yes.

Q It could be.

A I mean it's various over here, so I couldn't tell you which one you want from October 26th, 1:00 o'clock in the morning?

Q Look in the middle of that exhibit, please.

A Okay.

Q The middle portion.

A Yes.

Q The middle portion there is a part that more or less that is marked around, correct? A line is drawn around it somewhat.

A Correct.

Q And who is that area, that cellblock log, who is that referring to? Leeander Blake, correct?

A Correct.

MR. BATES: At this time, Your Honor, we would move into evidence Defense Exhibit Number D.

THE COURT: Any objection?

MR. PAONE: No, Your Honor.

THE COURT: All right. That will be admitted.

(The document marked for identification as Defendant's Exhibit D was received in **[133]**

evidence.)

BY MR. BATES:

Q Officer Reese, I just wanted to take a moment to look at that cellblock log for myself. And now if you could take a moment to look at that cellblock log. Could you please.

A Go ahead.

Q I mean, could you look at it?

A I saw it.

Q Oh, you saw it. And I looked at the 6:00 o'clock time period, Officer Reese, and I didn't see your name on there.

A Correct.

Q Okay. Was there a reason why your name wasn't on there?

A I --- check. I put my name on the books.

Q Why not?

A Because it was already done.

Q Oh, is there another cellblock log?

A There's the same one I'm looking at, yes.

Q Well, where is your name, Officer Reese?

A My name doesn't have to be on there.

Q I am confused.

A Okay. I'll explain to you. The reason why is because my supervisor met me over in the area by the time I cleared the cellblock area. And she did a check in the **[134]** logbook.

Q So, Officer Powell.

A Correct. Sergeant Powell.

Q Sergeant Powell, I am sorry.

A And also with Detective Johns time would be what time that I was in the area with the Defendant.

MR. BATES: Court's indulgence a moment, Your Honor.

THE COURT: Did you say that Sergeant Powell did the check at the same time you did, sir?

THE WITNESS: No. She logged the logbook in.

THE COURT: She what?

THE WITNESS: She logged in on the logbook.

THE COURT: Why did she do that? Did she do a --?

THE WITNESS: Maybe she did her check and put it in the logbook.

THE COURT: That was my question. Did she do a check on the Defendant in the cell?

THE WITNESS: She came over when I was clearing out.

THE COURT: Okay. And she signed off on the log.

THE WITNESS: Yes.

THE COURT: And that is the reason you didn't sign your name?

THE WITNESS: Correct.

THE COURT: Okay.

BY MR. BATES:

[135] Q You said at 6:00 o'clock, would you look back, who check on Mr. Blake at 6:00 o'clock?

A Well by the logbook, it says Detective Johns did.

Q But Detective Johns wasn't in that cellblock with you, was he?

A Well, he was in close proximity.

Q He was close enough to look through that little window, correct?

A And see me, yes. --- with somebody is checking on a person, somebody else could fill the book in, if that's what you're asking.

Q Oh, okay. So, basically --

A Yes.

Q -- your testimony would be that by Detective Johns seeing that you were checking in on Mr. Blake, Detective Johns was able to more or less sit down and say that he signed the cellblock log as if he checked on Mr. Blake, himself, correct?

A Correct.

Q Because you came and told Detective Johns that everything was all right with Mr. Blake, correct?

A Negative.

Q Okay. When--

MR. BATES: Court's indulgence for a brief moment.

THE COURT: Yes.

[136] (Pause.)

MR. BATES: At this time, Your Honor, I have no further questions.

THE COURT: Okay. Any questions.

MR. PAONE: Yes, Your Honor. Excuse me just for a moment, please, Your Honor.

THE COURT: Okay.

(Pause.)

CROSS EXAMINATION

BY MR. PAONE:

Q Officer Reese, good afternoon.

A Good afternoon.

Q Sir, when you yelled -- excuse me. When Detective Johns yelled to you, what exactly did he say, as best you can remember? I am talking about when he yelled, you were in the cellblock and he was in the booking room.

A He said that the Defendant had requested to talk to a lawyer.

Q And you were standing next to the Defendant at that time. Correct?

A Correct.

Q About how far away?

A Maybe two feet from the cellblock area. About where you are now.

Q --- to the Defendant?

[137] A Yes.

Q Okay. Indicating two to three feet. Now, Officer Reese, did you have any trouble hearing Detective Johns?

A No, sir.

Q Was the Defendant awake as far as you know at that time?

A Yes, he was.

Q Conscious as far as you know?

A He was standing at the cellblock.

Q Did you ever make any threats or promises to the Defendant?

A No, I did not.

Q Did you have any conversation with him after you were told he had asked for a lawyer?

A No, I did not.

Q Let's talk about for a moment what exactly he said, sir, when you went back to check on him at either 6:00 or 6:05 --- in the log. He said to you initially, "I want to talk to someone."

A Yes.

Q And your response was?

A "Who would you like to talk to?"

Q And he said?

A "The Detectives."

[138] Q All right. Did he say what he wanted to -- what did you say after that to him?

A That's when Detective Johns yelled out to me and said, "He requested a lawyer."

Q Did you ever tell Detective Johns specifically what he had said?

A Yes.

Q Okay. And was it in response to that that Detective Johns yelled to your saying something to Detective Johns? Or did you think Detective Johns had heard what he told you?

A I believe Detective Johns probably heard his voice.

Q But after he said that, I want to talk to someone. I want to talk to the Detectives, or words to that effect, you then turned around and said something to Detective Johns. That is correct, isn't it?

A No.

Q Okay. When did you say something to Detective Johns?

A After Detective Johns yelled out to me that he requested a lawyer.

Q Okay. And then that's when you said, what?

A That he would like to talk to the Detectives.

Q Okay. And Detective Johns in response to that said what, if anything?

[139] A He didn't say anything to me.

Q Okay. Did he say anything to the Defendant in your presence?

A No, he did not.

Q How would you describe Detective Johns' demeanor at that time?

A It was okay. He was fine.

Q All right.

MR. PAONE: Just a moment, please, Your Honor.

THE COURT: Yes.

(Pause.)

MR. PAONE: No further questions, Your Honor. Thank you.

THE COURT: You are welcome. Any other questions, sir?

MR. BATES: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BATES:

Q Officer Reese, if someone said that you said to Mr. Blake, "I bet you want to talk now, huh." Would that be true?

MR. PAONE: Objection.

THE COURT: Sustained.

MR. BATES: If I may, Your Honor.

THE COURT: Excuse me?

[140] MR. BATES: Your Honor, if I may. They opened the door based on their --.

THE COURT: Right. Well, it is the form of your question.

MR. BATES: Yes, Your Honor.

BY MR. BATES:

Q If Officer Reese, if -- did you ever make the comment, "I bet you want to talk now, huh?"

MR. PAONE: Objection, Your Honor. May I be heard?

THE COURT: Yes.

MR. PAONE: Your Honor, number one, that could have been covered in direct and it wasn't. There was no particular door opened. I asked him what his response was when he heard all of this. No where was anything like this covered on cross examination.

Now we did hear other testimony from Detective Johns, which -- do you want me to approach?

THE COURT: Yes.

MR. BATES: May we approach, Your Honor.

(Whereupon, a Bench Conference followed.)

MR. PAONE: Your Honor, we have heard testimony from Detective Johns that was a little bit different from what we have just heard from Officer Reese. There is no question about that. There may or may not be an explanation.

However, we didn't open any door like this with **[141]** regard to on cross examination. You know, I asked about the conversation that took place between he and the witness. Then I asked him if he said anything to Detective Johns. He said that he did, only after this young man had indicated he wanted to-- excuse me, Your Honor.

THE COURT: Well, you asked him any statements to the Defendant and he said no. Did he make any statements to the Defendant. ---.

MR. PAONE: I don't have an answer for that one.

THE COURT: Okay. Well, I am going to allow it. Okay.

(Whereupon, the Bench Conference was concluded.)

THE COURT: All right, go ahead, Mr. Bates.

MR. BATES: Yes, thank you, Your Honor.

BY MR. BATES:

Q Officer Reese, did you ever ask Mr. Blake or say to Mr. Blake, I bet you want to talk now, huh?

A No, I didn't.

Q If anyone ever said that you said that that would not be

factual?

MR. PAONE: Objection.

THE COURT: Sustained.

MR. BATES: Nothing further, thank you, Your Honor.

THE COURT: Okay. Anything based on that question, Mr. Paone?

[142] MR. PAONE: No, Your Honor.

THE COURT: All right. Thank you very much, sir. You can step down.

THE WITNESS: Thank you.

THE COURT: Sir, I am ordering you not to discuss your testimony with anyone.

(Witness excused.)

MR. PAONE: Your Honor, may this witness be excused for this afternoon?

THE COURT: I would say so. Mr. Ravenell, you didn't subpoena this witness did you?

MR. RAVENELL: No, Your Honor.

THE COURT: Okay. Then we ---.

MR. RAVENELL: But we did ask him to be present. But we didn't actually issue a subpoena.

THE COURT: All right. Then any problem with him being excused today?

MR. RAVENELL: None at all.

THE COURT: Okay. Thank you.

MR. RAVENELL: Your Honor, at this time, we would ask the Court to let us continue on next Friday with any other witnesses.

THE COURT: Okay. That is fine. Is there anything else then before we finish up for today?

MR. PAONE: I don't believe so, Your Honor.

[143] THE COURT: Okay. And what time are we beginning on Friday?

THE CLERK: 10:00.

THE COURT: 10:00 o'clock. Okay. Thank you.

MR. PAONE: There is some indication you might have a matter before that.

THE COURT: Okay. All right. Thank you. You all are excused.

MR. RAVENELL: Thank you, Your Honor.

MR. PAONE: Your Honor, if that matter should fall through, I think --

THE COURT: I will let you know.

MR. PAONE: Yes. I mean, we might be able to have people here earlier than that.

THE COURT: All right. Thank you.

(Whereupon, the hearing was recessed to reconvene at 10:00 o'clock a.m., May 16, 2003).

[1] IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,	*	
	*	
v.	*	Criminal Nos.
	*	K-2002-2154
	*	K-2002-2417
LEEANDER JEROME BLAKE,	*	
	*	
Defendant.	*	
	*	Annapolis, Maryland

May 16, 2003

MOTIONS HEARING

WHEREUPON, proceedings in the above-entitled matter commenced.

BEFORE: THE HONORABLE PAMELA L. NORTH,
Judge

APPEARANCES:

FOR THE STATE:

FREDERICK M. PAONE, Esq.
PAMELA ALBAN, Esq.
Office of the State's Attorney
Circuit Courthouse
7 Church Circle, Suite 200
Annapolis, Maryland 21401

[2] APPEARANCES (Continued):

FOR THE DEFENDANT.

KENNETH W. RAVENELL, Esq.
Schulman, Treem, Kamikow,
Gilden and Ravenell, P.A.
World Trade Center
401 E. Pratt Street, Suite 1800
Baltimore, Maryland 21202

IVAN JULES BATES, Esq.
724 Reservoir Road
Baltimore, Maryland 21217

[3] INDEX

			Page
General Discussion			4

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
For the Defendant:				
Leeander Blake	5	29	--	--
Lawanda Pierce	50	--	--	--
For the State:				
Greg Kirchner	64	68 69 (CT) 71 (PA)	68	70
Thomas Hannon	72	77 80 (CT)	--	--
William Johnson	86	--	--	--

CLOSING ARGUMENTS

	Page
By Pamela Alban, Esq. Attorney for the State	88
Rebuttal	152
By Kenneth Ravenell, Esq. Attorney for the Defendant	114

Rebuttal 157

EXHIBITS FOR IDENTIFICATION IN EVIDENCE

For the Defendant

E 28 28

Keynote: "---" indicates inaudible in the transcript.

[4] PROCEEDINGS

THE COURT: You can be seated. All right. Would you like to call the case?

MR. PAONE: Yes, Your Honor. Good morning.

THE COURT: Good morning.

MR. PAONE: The State would call K-2002-1254 (sic) and 2417. My name is Fred Paone. I am an Assistant State's Attorney for Anne Arundel County on behalf of the State.

MS. ALBAN: Pamela Alban on behalf of the State.

MR. RAVENELL: Good morning, Your Honor. For the record, Ken Ravenell on behalf of Mr. Blake.

MR. BATES: Good morning, Your Honor. Ivan Bates, as well, on behalf of Mr. Blake.

THE COURT: All right. Good morning. All right. And for the record, the Defendant is present in the Courtroom. Okay. Now, we were still in our motion hearing. And let's see where were we? We were in redirect. Was redirect finished?

MR. RAVENELL: Yes, Your Honor.

THE COURT: Okay. So are we ready for a new witness?

MR. RAVENELL: Ready for a new witness, Your Honor.

THE COURT: Okay.

MR. RAVENELL: Your Honor, we call Mr. Blake.

Whereupon,

LEEANDER BLAKE

[5] was called as a witness for the Defense, having been duly sworn, was examined and testified as follows:

THE CLERK: You may be seated. Would you please state your name and your address and spell your last name please for the record.

THE WITNESS: Leeander Blake. 1376 Tyler Avenue. B-l-a-k-e.

DIRECT EXAMINATION

BY MR. RAVENELL:

Q Good morning, Mr. Blake.

A How are you doing?

MR. PAONE: Your Honor, we before we start, I would renew my motion on witnesses. I don't know who is here.

THE COURT: All right. Is there anyone in the Courtroom who is going to testify for either side in the motions hearing? Okay. It doesn't appear there is. However, I will just say granted for the record. So if both sides, if you would just kind of look around once in a while to see if you see any witnesses in the Courtroom.

MR. RAVENELL: We have done that, Your Honor, on the Defense side. No witnesses present.

THE COURT: All right. Would you like to begin then?

MR. RAVENELL: Thank you.

BY MR. RAVENELL:

[6] Q Mr. Blake, let me advise you, sir, first that because you are a Defendant, you have an absolute right not to testify in this case. Do you understand that?

A Yes, sir.

Q You can get off that witness stand right now and come back and sit at the trial table with us and not say anything in this case. And we are in a motions hearing, not a trial, but Your Honor will not consider your silence at this motions hearing, if you choose to remain silent, and decide the fate this case. Do you understand that?

A Yes, sir.

Q You also have an absolute right, as any other witness, to take the stand and testify. Do you understand that as well?

A Yes, sir.

Q Now, you are 17.

A Yes, sir.

Q And you have no adult convictions. Is that correct?

A No, sir.

Q Let me explain to you that generally when a Defendant testifies at a motions hearing, what you say here today cannot be used against you later on at a trial. Do you understand?

A Yes, sir.

Q But there is an exception. If you were to testify [7] here today at this motions hearing and when the trial starts next week if you were to exercise your right to testify at the trial and your testimony is different at the trial than it is today, then the Prosecutors would be allowed to use your testimony to present to a judge or a jury at that trial for the judge or jury to use and make the determination whether to believe your trial testimony. Do you understand?

A Yes, sir.

Q And that term is called impeachment, but basically it's for them to say to the jurors on Friday he said A, today at the trial he is saying B. Should you believe what he is saying today? Do you understand that?

A Yes, sir.

Q All right. And we have had discussions about this matter on numerous occasions. Is that correct?

A Yes, sir.

Q And you fully understand your right to remain silent and your right to testify at this time?

A Yes, sir.

Q All right. And I understand you wish to testify. Is that correct?

A Yes, sir.

Q Do you have any questions of me before you decide to testify?

A No, sir.

[8] Q All right. Do you have any questions of the Court before you decide to testify?

A No, sir.

Q All right. Mr. Blake, let me draw your attention to October 26, 2002, in the early morning hours. Did there come a time when police officers came into your home, sir?

A Yes, sir.

Q Would you tell Your Honor what time it was when the police officers entered your home?

A 4:30 in the morning.

Q And tell Your Honor how you are so sure that it was 4:30 in the morning when the police entered your home.

A I was watching cartoons. I watching the Flintstones cartoons.

THE COURT: You were watching what kind?

THE WITNESS: Flintstones.

THE COURT: Flintstones cartoons.

THE WITNESS: Sorry about that.

THE COURT: Okay.

BY MR. RAVENELL:

Q And what time does the Flintstones come on?

A 4:30.

Q And had the Flintstones been on for a while when the police came into your home? Or had the show just started?

A It's just coming on.

[9] Q Okay. And how long had you been awake?

A I been awake hours.

Q When had you last slept.

A About 5:00 o'clock the p.m. That p.m., early that day.

Q Okay. And how long did you sleep?

A About three hours.

Q Now after you got up around 8:00 o'clock, p.m., the day previously, did you go back to sleep at all?

A No, sir.

Q Were you at home?

A Yes, sir.

Q Now when the police came into your home, describe for Your Honor how that occurred.

A Came in, guns, flashing lights, I was on my couch. They told me to get up. I said, "Do not shoot, please." They told me to get on the ground, face me down, handcuffed me.

THE COURT: Okay, sir. Don't go so fast, okay.

MR. RAVENELL: Slow down. Take your time because Your Honor has to take notes as well.

THE COURT: I'm a note taker.

THE WITNESS: Sorry about that.

THE COURT: All right.

MR. RAVENELL: Understand that --.

THE COURT: Just go a little bit more slowly. They [10] came in, guns and lights flashing, you said.

THE WITNESS: Yes, ma'am.

THE COURT: Then they said get up. Then they said get down on the ground.

THE WITNESS: Yes, ma'am.

THE COURT: All right. Go ahead, just a little slower.

BY MR. RAVENELL:

Q And did you get down on the ground?

A Yes, I did.

Q Okay. And what did you say to the police as you were doing that, if anything?

A I just said, "Do not shoot."

Q Okay. And after you were put on the ground, or you got down on the ground, what happened next?

A He cuffed me. And he took me out.

Q How many police offices [sic] were you aware of at that time entering with guns and flashing lights?

A About six or seven officers.

Q Okay. Would you tell Your Honor how you were dressed when those police officers came into your home?

A I had nothing but my underwear on and a tank top.

THE COURT: And a tank top?

THE WITNESS: Yes, ma'am.

BY MR. RAVENELL:

[11] Q And describe when you say a tank top.

A It's like cutoff sleeves. It's a white --- muscle shirt.

Q Okay. And when you say underwear, what were you

wearing?

A Boxer shorts.

Q Okay. After you were put in handcuffs, were you allowed to dress before being taken from the home?

A No, sir.

Q All right. Were you wearing any shoes?

A No, sir.

Q What happened after you were put in handcuffs in the condition you described?

A Officers rushed me out and put in a squad car.

Q Now when you were walking outside, describe the weather conditions for Your Honor, as you were taken out.

A Cold and wet.

Q Now how do you know it was wet other than your sensory perceptions of seeing it being wet?

A I had no socks on. I felt water under my feet. I was stepping in water.

Q Okay. After you were put into the police car, what happened next?

A They rushed me to the station. I got to the station and they took me into this little room.

[12] Q Now let me back you up for a second. When you were in the police car, how many police officers were in the car with you?

A Two.

Q Okay. And do you recall the race of the police officer in the car with you?

A It was a white officer and a black officer.

Q And who was driving? The white officer or the black officer.

A The black officer.

Q Were they male or female, or one of each?

A Male.

Q All right. The black officer, do you now know who that officer is?

A Yes, I do.

Q And who is that?

A Officer Reese.

Q And did you know Officer Reese prior to seeing him in that car on October 26, in the early morning hours?

A Don't know him. I've seen him around.

Q Okay. You have seen him being a police officer on the

street.

A Yes, sir.

Q Ever have any contact with him prior to this date?

A No, sir.

[13] Q While you were in the car with those police offices [sic] did you make any statements to them at all?

A No, sir.

Q Did anyone ask you any questions while you were in the car?

A No, sir.

Q All right. Now tell us what happened once you arrived at the police station.

A I got there. They put me in a chair. And then Detective Johns walked into the office.

Q Okay. Where were you place [sic] when you said you were put in the chair? Where was the chair?

A The chair was on the opposite side of the table. I was sitting on the opposite side of the desk.

Q Were you in a room? Or were you in a hallway?

A In a room.

Q Now when you said Detective Johns came in, did you

know that person to be Detective Johns when he entered the room?

A No, sir.

Q You later learned that to be Detective Johns.

A Yes, sir.

Q All right. Did anyone come into the room with Detective Johns?

A Officer Hannon.

[14] THE COURT: Officer who?

THE WITNESS: Hannon.

BY MR. RAVENELL:

Q Now did you know Detective, excuse me, Officer Hannon?

A Yes, I did.

Q And how did you know Detective Hannon prior to this October 26th?

A When I was young he used to do DARE programs at elementary schools and things. He come to our school and talked. He did like public speaking and things.

Q Okay. Now, would you tell Your Honor what happened, well when Detective Johns and Officer Hannon came into the room, was any other officer in the room with

you?

A No, sir.

Q Okay. So at that time it was the three of you in the room alone?

A Yes, sir.

Q All right. Tell Your Honor what, if anything, Detective Johns or Officer Hannon said to you as they entered the room.

A I sat down. Detective Johns came in. He introduced himself to me and sat down. He said, "Do you know why you're here?" I said, "Yes, I know why I'm here." He told me that Terrence Tolbert identified me as the shooter.

[15] And I sat there. I did not say nothing. Sat there --.

THE COURT: Okay, hold on, hold on.

BY MR. RAVENELL:

Q What was your -- slow down. When Detective --

THE COURT: Let me interrupt. I have to catch up. I am sorry.

MR. RAVENELL: I am sorry. Sure.

THE COURT: Detective Johns introduced himself to you. He said, "Do you know why you're here." Is that right?

THE WITNESS: Yes, ma'am.

THE COURT: And you answered, "Yes, I know why I'm here."

THE WITNESS: Yes, ma'am.

BY MR. RAVENELL:

Q Did you say yes, I know? Or did you just say, yes?

A I said, "yes."

THE COURT: You said, "yes."

THE WITNESS: "Yes, I know."

THE COURT: "Yes, I know."

THE WITNESS: Yes, ma'am.

THE COURT: Then what happened after that? I am sorry.

THE WITNESS: After that he said, "Terrence Tolbert identified me as the shooter." I did not say anything.

[16] BY MR. RAVENELL:

Q And tell us what was your reaction, if anything, when Detective Johns said Terrence Tolbert identified you as the shooter?

A Scared. Shaky.

Q What is the next thing that happened after Detective Johns said Tolbert identified you as the shooter?

A He took out this form and started reading over this form to me. He asked me if I understood everything on the form He read all the questions to me. He said if I understood everything, to initial my initials by the line.

Q Let me show you what has been marked as State's Exhibit 1, as evidence, in this motions hearing. Have you ever seen this document before, sir?

A Yes, sir.

Q And is that the form that was shown to you?

A Yes, sir.

Q And tell us what happened once this form was shown to you, sir.

A He showed me the form and he started to review the questions to me. He said if I understood every question, to initial my name by the underline.

Q And did you understand the questions that you initialed?

A Yes, sir.

[17] Q Okay. And what happened next?

A Afterwards he said to me, he read the questions, do I wish to talk to them without a lawyer. And I put no, I want a lawyer.

Q And did you say that you wanted a lawyer?

A Yes, sir.

Q Okay. Now I see where it's written no on this form. In addition to saying no, you are telling Your Honor that you said, "I want a lawyer?"

A Yes, sir.

Q Okay. After you told Detective Johns that you wanted a lawyer, were you asked then to sign this form?

A Yes, sir.

Q And did you, in fact, sign the form?

A Yes, sir.

Q After you made that statement to Detective Johns and signed the form, what, if anything, was done with you?

A I was placed in the cell. A holding cell.

Q Okay. Describe to Your Honor how that occurred.

A Detective Johns got me up and him and Officer Reese escorted me back to the cell.

Q Where did Officer Reese come from if he was not in the room originally with you and Officer Hannon and Detective Johns?

A He must have called him because he was like waiting **[18]** outside the door.

Q Okay. Officer Reese was outside the door.

A Yes, sir.

Q Okay. And when you went outside that room, tell us what happened next.

A They placed me in the cell. They walked me down and placed me into a cell.

Q Okay. And you say, "they," let's make sure again who you are referring as "they."

A Officer Reese and Detective Johns.

Q Okay. And when you were placed in that cell, let me ask you this. Did Corporal Hannon, the officer whom you had known from the DARE program. Was he the person who placed you in that cell?

A Yes, sir.

Q Was it Corporal Hannon or Detective Johns?

A Corporal -- I am sorry. Corporal Hannon and Detective Johns. I am sorry.

THE COURT: Okay. Wait.

MR. RAVENELL: Wait a minute slow down.

THE COURT: Let's go back.

BY MR. RAVENELL:

Q I am asking you --

THE COURT: Did you say -- go ahead. I am sorry. I am confused.

[19] BY MR. RAVENELL:

Q You said Officer Reese and Detective Johns placed you in the cell. Is that correct?

A Yes, sir. Officer Reese and -- no. It was Detective Johns and Officer Hannon that placed me in the cell.

Q Okay. So it was those two officers that put you in and placed you in the cell.

A Yes, Sir.

Q Okay. And, when you were placed in the cell by Corporal Hannon and Detective Johns, did either of those officers say anything to you as they placed you in the cell?

A No, sir.

Q Did there come a time later when you saw Officer Reese again?

A Yes, sir.

Q Okay. And when did you next see Officer Reese?

A Him and Officer Johns walked back and handed me my charging documents.

Q All right. Tell me this. After you were placed in the cell by Corporal Hannon and Detective Johns, how long after you were placed in the cell did you next see Officer Reese and

Detective Johns at your cell?

A About ten minutes.

Q Okay. And describe for Your Honor what occurred when Officer Reese and Detective Johns came to your cell.

[20] A Officer Reese and Detective Johns came to my cell. Detective Johns gave me my charging documents and was briefly going over with me. And I saw, he read over, I saw my charges and everything.

Q What did you see?

A I saw that I was facing death. And Officer Reese just yelled out, "I bet you want to talk now, huh!"

Q Tell Your Honor, and, again, you said it. And use the voice, your voice, and tell us how and how loudly Officer Reese made that statement to you. Not into the microphone. But step away from the microphone and do it.

A He gave me my charges and everything. I saw my charging documents. And Officer Reese just said, "I bet you want to talk now, huh!"

Q And when Officer Reese said that to you, how did you feel?

A I, I mean, I was just scared. I just got my charges and I was just shook. I was scared.

Q Okay. Now, you said that you had looked at the papers and saw that you face death at the time that Officer Reese was saying, making these comments to you?

A Yes, sir.

Q Okay. Now, after Officer Reese made the comment to you that, " I bet you want to speak to us now, huh!" And you have told us you then became scared. What was the next thing **[21]** you observed happen?

A They left.

Q Tell us how they left. What did you see happen?

A Detective Johns like pushed Officer Reese back. Was pushing him back from the cellblock. And they turned around and walked away.

Q Okay. Now, after Officer Reese and Detective Johns left the cellblock on that occasion, did you see Detective Johns again?

A Yes, sir.

Q And how long after Officer Reese and Detective Johns left the cellblock did you see Detective Johns again?

A About 15 minutes.

Q Describe what happened on that occasions when Detective Johns came to your cell.

A He came to me and said, "Mr. Blake, do you wish to still talk to me?" I said, "May I still talk to you?" He said, "Yes." I said, "Yes."

Q Now had you been brought any clothes at all during this time period?

A Yes, sir.

Q When were you brought the clothes?

A I was brought the clothes before he had come back to me and asked me did I want to talk.

Q Okay. Well, let's get the sequence correct. **[22]** Officer Reese and Detective Johns were in the cellblock. You told us what occurred there.

A Yes, sir.

Q Those two officers then left.

A Yes, sir.

Q Did someone bring you your clothes next?

A After that Detective Johns had bring me my clothes.

Q Okay. How long after Detective Johns and Officer Reese left after the confrontation that you told us about, did Detective Johns return and bring the clothes to you?

A Ten minutes. About ten minutes.

Q On the occasion when Detective Johns brought the clothes to you did he say anything to you at that time?

A No, sir.

Q Okay. All right.

THE COURT: Okay. So, we are right now in time, we

are before he said --.

MR. RAVENELL: Before, yes.

THE COURT: Okay. So we are backed up.

MR. RAVENELL: Yes. He is filling it in between. There was an encounter in between.

THE COURT: All right.

BY MR. RAVENELL:

Q All right. So, Detective Johns brought you your clothes and left. Is that correct?

[23] A Yes, sir.

Q Did you dress?

A Yes, sir.

Q All right. Now you have told us earlier that you saw Detective Johns again after he brought you the clothes.

A Yes, sir.

Q How long after he brought you the clothes did you see him again at the cellblock?

A 15 minutes.

Q Okay. And tell Your Honor what happened when Detective Johns brought you the clothes -- excuse me. Came in on this occasion, I apologize.

A He approached me. Approached the cell and said, "Mr. Blake do you wish to still talk to me?" I said, "May I still talk to you?" He said, "Yes." I said, "Yes."

Q Okay. Now you said, do you still talk to him. Had you ever said that you wanted to talk to him before?

A No, sir.

Q Okay. So what did he say to you, to the best of your recollection, when he came to the cell?

A He said, do I want to talk to him.

Q Okay. And what was your response?

A "May I still talk to you?"

Q All right. And what was Detective Johns' response?

A He said, "Yes."

[24] Q And what did you say?

A I say, "yes."

Q What happened at that point?

A He took me out of the cell. He put me back in the little office room. And took another form out.

Q Tell me, sir, when Detective Johns came back in and you agreed to talk to him, what caused you to agree to speak to Detective Johns on this occasion when you had said earlier, when you were given your Miranda rights, that you didn't want

to speak to him?

A First it was what Office [sic] Reese said to me, "I bet you want to talk now, huh!" I was scared, cold. Never went through nothing like this. And I saw my charges and I saw I was facing death.

Q Okay. Now, after those things caused you to want to speak to Detective Johns, did you, in fact, talk to him?

A Yes, I did.

Q And were you given your Miranda warnings again once you were taken back into the room?

A Yes, I was.

Q And, let me show you what is State's Exhibit 2. Have you seen this form before?

A Yes.

Q Is that the form that was shown to you by Detective John's [sic] on the second occasion?

[25] A Yes, sir.

Q And did you sign that form?

A Yes, sir.

Q And near the bottom, there is a question that was asked of you earlier, this, "Will you talk to us without a presence of a lawyer?" And you wrote what?

A Yes.

Q And that was obviously different than what you wrote earlier when you wrote no. Is that correct?

A Yes, sir.

Q And after you were given your Miranda warnings the second time, did you, in fact, make a statement to Detective Johns and Corporal Hannon?

A Yes, sir.

Q After you made that statement were you later asked by Detective Johns to take a polygraph exam?

A Yes, sir.

Q What did Detective Johns say to you about the polygraph exam, if anything?

A He asked me about it and everything. And I asked him would it help me. He said, "Yes."

Q You actually asked Detective Johns whether this would help you by taking the polygraph exam?

A Yes, sir.

Q And what was his reponse?

[26] A "Yes."

Q Did his comment that this would help you have any impact on you agreeing to take the polygraph exam?

A It did have an impact on me. But, also when Officer Reese said, "I bet you want to talk now, huh!" and I was scared. And I wanted not to let this also wanted -- it had an impact on me talking.

Q Let me ask you this. You said that earlier you made a couple of references to it being cold. In the cellblock you are referring it to being cold.

A Yes, sir.

Q All right. How long had you, and we are going to step back in time a little bit here, how long had you been, from the time you left your home until you agreed to speak to the police, how long had you been held there without clothes?

A Probably an hour.

Q Now, before October 26, 2002, had you been arrested before?

A Yes, I did.

Q How many times?

A Two times.

Q And those were two drug charges. Correct?

A Yes, sir.

Q Had you ever been given your Miranda warnings before?

[27] A No, sir.

Q What happened on those other arrests?

A I was served a juvenile citation and released to my parents.

Q Okay. Had you been questioned by the police on those prior arrests?

A No, sir.

Q Now after agreeing to take this polygraph exam, did you meet with the technician?

A Yes, I did.

Q And who was present in the room when you initially met with the technician?

A Officer -- Detective Johns.

Q So, there were three people.

A Yeah. Me, and Corporal White Office [sic] Johns, Detective Johns.

Q Did you ask those two individuals anything prior to taking the polygraph exam?

A Yes. I stated a question again, would this help me. And he said, "yes."

Q Who said yes?

A Corporal White.

Q All right. And the fact that Corporal White said that this would, confirmed that this would help you, did it have any impact on your taking the polygraph exam and the **[28]** statements you later gave?

A Yes, it did.

Q Okay. Now, if you hadn't been told that this would help you, taking the polygraph exam, would you have taken it?

MR. PAONE: Objection.

THE COURT: Overruled.

MR. RAVENELL:

Q You can answer.

A No, sir.

MR. RAVENELL: No further questions. Your witness. Your Honor, we would move one thing into evidence, which I have shown to the Government (sic) before, which is Defense Exhibit E, which is the weather report for October 26th.

THE COURT: Do you have any objection?

MS. ALBAN: None, Your Honor.

MR. PAONE: No objection, Your Honor.

THE COURT: All right. E will be admitted.

(The document referred to was

marked for identification as Defendant's Exhibit E and was received in evidence.)

MR. PAONE: May I have just a moment, Your Honor?

THE COURT: Sure.

MS. ALBAN: Court's indulgence.

(Pause.)

[29] MS. ALBAN: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. ALBAN:

Q Good morning, Mr. Blake.

A How are you doing?

Q I am good. How are you?

A Fine.

Q You testified you are 17 years old. Is that correct?

A Yes, ma'am.

Q You are almost 18, right?

A Yes, ma'am.

Q When is your birthday?

A 6/1/85.

Q Okay. So, that would make you in October about 17 and four months old, almost five months old?

A Yes, ma'am.

Q And you had completed the tenth grade back in October. Right?

A Yes, ma'am.

Q And you were still in school.

A Yes, ma'am.

Q And you actually weren't in any special education classes at that point.

A No, ma'am.

[30] Q And you really have never taken any of those classes.

A Sixth and seventh grade I was in them.

Q Okay. But not at that time frame.

A No, ma'am.

Q And you were working at that time.

A Yes, ma'am.

Q You were working at T.J. Max.

A Yes, ma'am.

Q And you had a variety of capacities there. Right?

A Yes, ma'am.

Q You worked on the register and in sales.

A Yes, ma'am.

Q And you also helped stock.

A Yes, ma'am.

Q And that wasn't your first job either, was it?

A No, ma'am.

Q You had had several jobs.

A Yes, ma'am.

Q And all these jobs you had while you were in school. Is that correct?

A Yes, ma'am.

Q Okay. You had had a conversation about going to college. Hadn't you?

A Yes, ma'am.

[31] Q And were you hoping to do that?

A Yes, ma'am.

Q And you had a goal of becoming an electrician at one point. Right?

A Yes, ma'am.

Q You had just recently in October finished probation. Is that correct?

A Yes, ma'am.

Q And that was for one of the drug charges.

A Yes, ma'am.

Q Okay. And those were the two that you were arrested for.

A Yes, ma'am.

Q You had done very, really well, actually, on probation, hadn't you?

A Yes, ma'am.

Q You were able to complete your community service.

A Yes, ma'am.

Q And you attended school like you were supposed to.

A Yes, ma'am.

Q And you actually went into counseling, right?

A Yes, ma'am.

Q And that was drug counseling, correct?

A Yes, ma'am.

Q Okay. And you had completed it, but you decided on [32] your own to continue in that counseling.

A Yes, ma'am.

Q Okay. Let's talk about that night a little bit. Your testimony is that you had been awake for hours that night.

A Yes, ma'am.

Q Okay. So, you didn't tell Corporal White that you had actually just been woken up at 4:30 in the morning.

A No, ma'am.

Q You didn't say that to him.

A No, ma'am.

Q Okay. So you had been awake since 5:00 p.m. the day before.

A Yes, ma'am.

Q Was that normal behavior for you to stay up all night?

A Yes, ma'am.

Q It was.

A Yes, ma'am.

Q So it wasn't unusual?

A No, ma'am.

Q And yet you were still in school.

A Yes, ma'am.

Q And you were still holding down a job.

A Yes, ma'am.

Q You had taken a nap the night before too. Is that **[33]** correct? About three hours.

A Yes, ma'am.

Q Okay. When the officers came and arrested you, they didn't assault you in any way did they?

A No, ma'am.

Q Did they physically threaten you in any way?

A No, ma'am.

Q They just had their guns drawn.

A Yes, ma'am.

Q And they asked you to get down to the ground.

A Yes, ma'am.

Q And then once they put you in handcuffs, they took you right to the car.

A Yes, ma'am.

Q And they didn't assault you.

A No, ma'am.

Q Okay. And they didn't talk to you on the way to the police station.

A No, ma'am.

Q Okay. You knew Corporal Hannon. Is that correct?

A Yes, ma'am.

Q And you knew him from DARE.

A Yes, ma'am.

Q So you had a pretty good interaction with him in the past.

[34] A Yes, ma'am.

Q Okay. And he was present when you were advised of your rights with Detective Johns.

A Yes, ma'am.

Q And he was present the second time as well. Right?

A Yes, ma'am.

Q And he was present during that entire statement.

A Yes, ma'am.

Q Okay. In fact you didn't actually talk to Detective Johns except for when you were back in the cellblock without Corporal Hannon present. Right?

A Yes, ma'am.

Q And you were advised of your Miranda rights. Correct?

A Yes, ma'am.

Q And you had seen on TV Miranda rights before, right?

A Yeah, I seen them.

Q Yes. Like on NYPD Blue or something like that.

A Yes, ma'am.

Q Okay. But you read the form along with Detective Johns when he advised you.

A Yes, ma'am.

Q And he told you to ask him any questions if you had any questions.

A Yes, ma'am.

[35] Q And you didn't not understand anything. Correct?

A Yes, ma'am.

Q You understood everything.

A Yes, ma'am.

Q And you initialed when you were told, when you indicated you were understood -- to indicate that you understood each right.

A Yes, ma'am.

Q Let's talk about the clothes. You said you thought you were at the police station about an hour without clothes. Is that correct?

A Yes, ma'am.

Q Okay. So, you were taken to the police station. Right?

A Yes, ma'am.

Q And you were advised of your rights. Right?

A Yes, ma'am.

Q And then you were put back into your cell.

A Yes, ma'am.

Q And then it was about 15 minutes when they came back and served the documents on you. Correct?

A Yes, ma'am.

Q So, so far you have elapsed maybe about 25 minutes. Is that fair?

A Yes, ma' am.

[36] Q And then you were given your clothes about ten minutes later. Is that fair?

A Yes, ma'am.

Q Okay. So actually it was less than an hour that you didn't have your clothes on. Right?

A Yes, ma'am.

Q And then once you put those clothes on there was no longer any -- you weren't cold. Correct?

A No, ma'am.

Q Okay. You indicated that when you saw your statement of charges, that is when you learned that you could be facing death. The death penalty. Is that correct?

A Yes, ma'am.

Q That is the first time that you learned that at that point. Wasn't it?

A Yes, ma'am.

Q Now you knew Terrence Tolbert. Correct?

A Yes, ma'am.

Q And you knew him from the neighborhood.

A Yes, ma'am.

Q You frequently saw him, didn't you?

MR. BATES: Objection, Your Honor.

THE COURT: Okay. Why do you want to ask him those questions?

MS. ALBAN: Your Honor, may we approach?

[37] THE COURT: Sure.

MS. ALBAN: Thank you.

(Whereupon, a Bench Conference followed.)

MS. ALBAN: Your Honor, I think it becomes important --- his relationship with Tolbert because of their relationship and how they committed this crime. And then that he is finding out that Tolbert actually is the one who ratted him out.

And everything that happened, Tolbert is the one who pointed the finger at him. Tolbert is the one who said he was the shooter --- to take the blame. So I think it's important to understand his relationship with Terrence Tolbert. And it becomes important then to go into the statement of charges.

THE COURT: Why ---? Are you saying that would provide his own inducement for him to change his mind?

MS. ALBAN: Yes. It would be an intervening factor

to learn that this person that he has known as a friend or was familiar enough to commit this crime with who he may have talked about not talking to the police. Told the police that the [sic] was the one who did it.

THE COURT: What would you like to say?

MR. BATES: Your Honor, first of all Mr. Blake has admitted that police told him this when he first sat down. That Terrence Tolbert had positive --- the shooter before he even saw the statement of charges. So he knew that before he ever got the statement of charges.

[38] Detective Johns sat him down in an interview room and said to him, you know why you are here. He said, yes. The Detective said Terrence Tolbert has positively identified you as the shooter. He said, yes. So he knew this before.

THE COURT: --- Defendant's version.

MR. BATES: It is the Defendant's version.

THE COURT: I don't think --- about that.

MR. BATES: I agree.

MS. ALBAN: And the State intends to call a rebuttal witness to rebut that. That that did not actually happen.

MR. BATES: If I may, Your Honor. And I have no problem with them arguing that their version of this being an intervening factor. What I don't believe is necessary is for us to go into the history of Terrence Tolbert and Leeander Blake.

Asking whether they know each other and whether their [sic] friends is fine. But, you know, they are basically trying to build evidence for their case later on is what I am objecting to.

I think that certainly there should be some leeway. I think they have gotten that. He knows Terrence Tolbert. They have been friends. She has gotten that. But then to go further is what I object to.

MS. ALBAN: Actually, I didn't get ---.

THE COURT: I think that it would be fair for you to **[39]** ask those limited questions. Not to go into that any further.

MS. ALBAN: Okay. Can, then, while we are here. I intend to ask where they lived in proximity to each other and any contact that they had had regarding ---.

THE COURT: Regarding what? The case?

MR. BATES: I absolutely object to that, Your Honor.

THE COURT: Why would that be introduced? Because the thing is anything about stuff it's already in his mind that --- originally said I don't want to talk to the police officer. ---.

MS. ALBAN: It does in the mind. It basically is showing that this person who he had trusted said they weren't going to talk to the police. He finds out then he told the police. And, in fact, he pointed the finger at him. And I think it goes to his state of mind and his motivation for at that point talking to the police. It goes to -- it's an intervening factor.

I need to set the record straight. I need to get out that I am not the one. And he is going to be angry at his friend. I think it all goes into the motivation as to why he said to the police. And it is all grounds ---.

MR. BATES: Your Honor, I think they can certainly ask him about what impact, if any, these things had on him once he read that. That is fine. But to go into whether he had seen it and whether they had discussed the case absolutely **[40]** is --.

MS. ALBAN: Well, basically if they had decided that they weren't going to talk, we are not going to tell anyone, we are not going to talk to the police, and then he finds out that he does.

THE COURT: Yes. But --- a motion hearing that talked about a case. I mean, I am looking at this as a clean slate. If the guy is innocent, why on earth would they talk about the case? And so it's very, very incriminating, the answer to that questions.

MS. ALBAN: Well, I appreciate it. But, I mean, I guess I think I get to go into whether they decided whether they were going to talk about this. Because, I am going to offer evidence that he wasn't told before the first advisement that Tolbert was the one who ratted on him.

THE COURT: All right. So, let's use your version for a second. Let's say he was never told and he finds out at this moment.

MS. ALBAN: And he is reading the paperwork, that his ---. He invoked -- I am not talking. That is what we said we were going to do. I am not going to talk. And then he sees

this paperwork and then he decides to talk because --- and he pointed the finger at him.

THE COURT: I guess my problem with it is I am having trouble figuring out how that would induce somebody to **[41]** talk. To me that would make me clam up. If I find out that my buddy, if he is one, talked, I am not sure how that is an inducement to get me to talk.

MS. ALBAN: I am not saying that is an inducement. I think it's an intervening factor. I think it basically goes to you both had said you weren't going to talk and all of a sudden he is singing like bird. I think at that point then you are going to try to say and get -- see.

THE COURT: Okay. So you are saying that as soon as he finds that out, that is the reason why he changed his mind.

MS. ALBAN: Yes. It's an intervening factor. They had had this between them.

THE COURT: Okay. But, can't you do that without asking him about the offense. I am not going to let you ---.

MS. ALBAN: Can I say, did you talk about whether you were going to tell anyone about this?

THE COURT: No! Because that gives away -- I mean, why would they be talking about the crime if they didn't commit it? And so far, I mean, I don't know. I have a problem with that. Why can't you just say what was the relationship with Tolbert? Did you hang out together in the community and stuff like that. And then you found that Tolbert, what ever his name is, is it Tolbert?

MS. ALBAN: Yes.

THE COURT: Tolbert spilled the beans, so to speak, [42] did that have something to do with why you changed your mind.

MS. ALBAN: I put forth that I feel that it would be something of -- and that hearing that a co-defendant had made a confession implicating you after you had --.

THE COURT: I agree with all of that. I am just saying I don't think you should be asking whether or not they discussed the case.

MS. ALBAN: And then I am not quite sure how I can get around. I mean I don't have any --.

THE COURT: Well, it's just as much agreeing to change your mind if you don't go into that. Because what you are telling me is all of a sudden he finds out this Tolbert person has told the police, I assume, that he is involved in the crime. Right?

MS. ALBAN: Yes.

THE COURT: Okay. So, if you are correct, that might be a reason to think okay he has already talked, I need to make a deal. I need to talk right now.

MS. ALBAN: Okay. And I will just argue with him.

THE COURT: Right.

MS. ALBAN: Okay.

(Whereupon, the Bench Conference was concluded.)

THE COURT: Okay.

BY MS. ALBAN:

Q Mr. Blake, so you and Mr. Tolbert lived in the same [43] neighborhood. Is that correct?

A Yes, ma'am.

Q And in fact, you lived at 1376 Tyler Avenue.

A Yes, ma'am.

Q Okay. And he lived at 1386 Tyler Avenue.

A Yes, ma'am.

Q So, it's just a few doors down. Okay.

A Yes, ma'am.

Q Okay. And you frequently saw him in the neighborhood.

A Yes, ma'am.

Q And you were very friendly with him.

A Yes, ma'am.

Q Did there come a time then that, so the police arrest you. Is that correct?

A Yes, ma'am.

Q And this is the first time that you were learning that Terrence Tolbert talked to the police. Is that correct?

A Yes, ma'am.

Q Up until that point you didn't know that Terrence Tolbert had talked to the police.

A No, ma'am.

Q You indicated, you said the police told you initially, before they even advised you of your rights that Terrence Tolbert had pointed the finger at you. Is that **[44]** correct?

A Yes, ma'am.

Q And that he had said that you were the shooter.

A Yes, ma'am.

Q Okay. Well, then you get back in your cellblock and that is when you are given the statement of charges. Is that correct?

A Yes, ma'am.

Q Did you know at this point, up until the police made that comment, did you know whether Terrence Tolbert had been arrested?

A No, ma'am.

Q So you are first learning that the police had gotten to

Terrence Tolbert.

A Yes, ma'am.

Q Okay. So now you are in your cell and you get the statement of charges and you are reading it. Right?

A Yes, ma'am.

Q And that is the first time you are learning that you are facing death.

A Yes, ma'am.

Q And you are also learning the extent to which Mr. Tolbert had talked to the police. Correct?

A Yes, ma'am.

Q Because, as you read it, you read that Terrence **[45]** Tolbert had told the police that he had been with you --

A Yes, ma'am.

Q -- on the evening of the murder.

A Yes, ma'am.

Q And he, in fact, identified your picture.

A Yes, ma'am.

Q And that you - he said to the police that you were the one who had shot Mr. Griffin.

A Yes, ma'am.

Q He said that both of you had approached the victim. Right?

A Yes, ma'am.

Q But that you were the one who pointed the gun at him.

A Yes, ma'am.

Q And that the victim was shot by you in the head.

A Yes, ma'am.

Q And that you were the one who had taken the victim's car keys.

A Yes, ma'am.

Q And you had taken them from his pocket.

A Yes, ma'am.

Q And that you were the one who drove from the scene.

A Yes, ma'am.

Q And you drove over the victim as you left the scene.

[46] A That's what he was stating.

Q Right. That is what Terrence Tolbert had told the police. Right?

A Yes, ma'am.

Q And this is the first time that you are hearing and reading the details of which he provided to the police. Correct?

A Yes, ma'am.

Q But that wasn't really how it happened, was it?

A No, ma'am.

Q And actually it was Terrence who was the one who, Terrence Tolbert who is the one who had the gun.

A Yes, ma'am.

Q And it was Tolbert who was the one who actually pulled that trigger.

A Yes, ma'am.

Q And it was actually Tolbert who was the one who went into the victim's pocket and grabbed out the car keys. Correct?

A Yes, ma'am.

Q And it was actually Tolbert who was the one who drove over the victim on the way out of that court. Is that correct?

A Yes, ma'am.

Q So everything that Tolbert had told the police that **[47]** you had done, he was the actually the one who had done.

A Yes, ma'am.

Q Okay. And you were angry when you found out that Tolbert was trying to blame you for this murder, weren't you?

A Yes, ma'am.

Q And you felt betrayed.

A Yes, ma'am.

Q And you wanted the police to know the truth. Right?

A Yes, ma'am.

Q And you didn't want to take the fall for Mr. Tolbert, did you?

A No, ma'am.

Q And it was important that the police know the truth.

A Yes, ma'am.

Q And it was also important to you that the police believed you. Isn't that true?

A Yes, ma'am.

MS. ALBAN: Court's indulgence, Your Honor.

THE COURT: Okay.

(Pause.)

MS. ALBAN: Okay. No further questions, Your Honor.

THE COURT: Okay. Anything else, Mr. Ravenell?

MR. RAVENELL: Nothing further, Your Honor.

THE COURT: All right. Thank you, sir. You can step down.

[48] (Witness excused.)

THE COURT: All right. Mr. Ravenell, would you like to call any additional witnesses?

MR. RAVENELL: Yes, Your Honor. We would ask for Ms. Pierce.

THE COURT: All right. Ms. Pierce would you just have a seat right here for a second. Counsel, do you want to approach the Bench for a minute?

(Whereupon, a Bench Conference followed.)

THE COURT: I just want to put on the record that I know Ms. Pierce. Maybe she has already told you this. I know her because there is a young man who is living with her who is not her son, who she took in.

And he is in the juvenile drug court in the Courthouse. So on occasions that this young man, I think his name is Mr. Norris or something, when he comes in for juvenile drug court, Ms. Pierce brings him in. And, on a rare occasion, Ms. Pierce has made a statement like, you know he is doing well around the house and that kind of thing.

She has never, ever mentioned any other children. Is she Mr. Blake's mother?

MR. BATES: His mother.

THE COURT: And, I just wanted to make that clear for the record, that I have met her before.

MR. BATES: All right.

[49] THE COURT: And that boy is still in the juvenile drug court.

MR. RAVENELL: Your Honor, do you think that that would affect your judgment --

THE COURT: No, not at all.

MR. RAVENELL: -- on the credibility.

THE COURT: But I just wanted to make clear that I know her from the juvenile drug court in the limited times that she has made a statement on behalf of this young man.

MR. RAVENELL: If you feel that it is okay with you, it is okay with me.

THE COURT: Okay. Do you have any problem with that?

MR. PAONE: No, Your Honor.

THE COURT: Okay.

(Whereupon, the Bench Conference was concluded.)

THE COURT: Okay. Ms. Pierce, do you want to come up.

Whereupon,

LAWANDA PIERCE

was called as a witness for the Defendant, having been duly sworn, was examined, and testified as follows:

THE CLERK: You may be seated. Could you please state your name and your address. And then spell your last name for the record.

[50] THE WITNESS: My name is Lawanda Pierce. My last name is P-i-e-r-c-e. I live at 1376 Tyler Avenue.

THE COURT: Okay.

MR. BATES: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. BATES:

Q Good morning, Ms. Pierce.

A Morning.

Q Ms. Pierce, are you currently employed?

A Yes.

Q And, what do you do?

A I'm a -- I do private duty nursing.

Q How long have you been doing that?

A For two years.

Q Ms. Pierce, do you know a gentleman named Leeander Jerome Blake?

A Yes.

Q How do you know him?

A He's my son.

Q Do you see him in the Courtroom?

A Yes. He's sitting right there (indicating.)

MR. BATES: Just for the record, identifying my client, Your Honor.

THE COURT: Okay. Thank you.

BY MR. BATES:

[51] Q And, do you remember the morning of October 26, 2002?

A Yes.

Q How do you remember that morning?

A I had just got home around 1:30 from work. And I normally do a little things before I go upstairs and take my

shower and go to bed. And it had to be about, around about 2:30/3:00 o'clock when I laid down. And before I know it, this loud noise had woke me up. I heard someone had hollered.

And then I heard a bursting noise. Like bursting one of the rooms. And then they came in my room and shined the light in my face.

Q When you say, "they," who is they?

A Well, the officers.

Q Okay. You mean the police officers?

A Yes, sir.

Q You said you heard a holler noise. I mean, could you describe that noise?

A It sound like, like my child had hollered out. Like screaming. Like somebody likes fighting in front my doors like they was coming in my house. And then next thing I know I heard like the running noise.

And then I heard this bursting noise. And next thing I know they had opened up my door and the officer had opened up my door and they flashed the light in my face and **[52]** told me to put my hands up.

And as I had put my hands up, I said, "Oh, my God, what's going on?" So the officer told me to shut up and just keep my hands up. And I kept saying, "Well, what's going on? What's going on?" And then my friend, John, that had said just be quiet. Listen to what they said.

Then I said, "Well, look, I have two grandkids in the other room." And then the officer said, "Just be quiet and keep your hands up." And then the next thing I heard the officer say, "Well we got him. We got him."

And then I heard another bursting noise. They had broke in my other son's room. And next think [sic] I know they had put handcuffs on me. Handcuffs on my friend, John. And my friend John had asked them, say, "Well, can you please put them shorts on me?" Because he didn't want to go downstairs like that.

So the officer helped him put his shorts on. And then they took my son, Timothy, downstairs first. Then they had --

Q When you say, "they" you are referring to the police officers. Correct?

A I mean the officer took my son Timothy downstairs first. Then they had my two grandkids. Then the officer asked me and John come. Then we went downstairs. Then they had my other son, Robert. And then they had all of us sitting in a **[53]** chair with handcuffs on.

So my son, Timothy, said to the officer that he was cold because they had the front door open. And they had got some blankets and put over Timothy. And they put a blanket over ---
.

MR. PAONE: Your Honor, I am going to object to this not being relevant to any issue in this proceeding.

THE COURT: Do you want to say anything about that, Mr. Bates?

MR. BATES: Yes, Your Honor. It shows the course of atmosphere of the police in which they then burst into the house, a course of atmosphere. They took the opportunity and time to allow Ms. Pierce and the other family members to put on their clothes.

THE COURT: All right.

MR. PAONE: At this point, the young man was gone, even by her testimony. He was handcuffed and out the door when all this happened. It has nothing to do with --.

THE COURT: Okay. I missed that.

MR. BATES: I missed that as well.

THE COURT: All right. Let's clear that up. Because I didn't realize that he was out the door. I don't have that in my notes.

BY MR. BATES:

Q When you went downstairs, did you see anybody? How **[54]** many people were in the house?

A It's --.

Q When you went to sleep.

A All of us was in the house.

Q Okay. When you say all of us, who?

A All my kids. All three of my boys was home. And my two grandkids and I. And my friend, John.

Q And then you were taken by the police in cuffs, handcuffs, downstairs. Correct?

A Yes, sir.

Q And how many people then were in handcuffs?

A It was four.

Q Who was missing?

A My son, Leeander.

Q Do you know where he was?

A No.

Q Do you know what happened to him?

A No.

Q Did anyone tell you?

A No.

Q And, what happened next?

MR. PAONE: Objection.

THE COURT: Okay. I am going to sustain that unless you have something you want to tell me about that.

MR. BATES: Yes, Your Honor. May we approach?

[55] THE COURT: Sure.

(Whereupon, a Bench Conference followed.)

MR. BATES: Your Honor, if I may. One of her other children, he was arrested by the police as well. However, the police allowed him to put his pants and clothes on. And this shows a course of atmosphere in which they were all in the handcuffs. It shows the whole atmosphere by the police.

THE COURT: Is the other son still in the house where we are right now?

MR. BATES: Yes, he was still in the house.

THE COURT: They weren't taken away at the same time?

MR. BATES: Not at the same moment, but a few moments later he was taken away.

THE COURT: Okay. Do you want to say anything about that?

MR. PAONE: Yes, Your Honor. It shows nothing at the time. They were out to get the Defendant to make the arrest. That is why they were there. Any arrests after that were secondary and I think given the nature of the case that they had been working on, that is why they had the Defendant out of the house quickly. This has nothing to do with any of the atmosphere.

THE COURT: I am just questioning how it could have any bearing on anything that the Defendant would be feeling. I **[56]** mean if he is not even there to see any of this, how could it --?

MR. BATES: See, the whole course of the atmosphere of the police in the sense that once you are in handcuffs, technically you should be arrested.

THE COURT: Right. But, I am saying --

MR. BATES: Everybody is in handcuffs.

THE COURT: -- even if they did the most egregious things possible, what difference would it make if he didn't see any of it. I think at the time he is out of the house. It's no longer relevant.

MR. BATES: It's the actions that were toward him. He can see those actions.

THE COURT: But I thought that she just testified that her son was missing now at this time.

MR. BATES: He was out of the house, however, the shows the coercive atmosphere in which they almost and gestapo techniques, since they burst into --.

THE COURT: I am going to let you go into full detail anything that happened while Mr. Blake was still there. But after he is --- it is irrelevant.

MR. RAVENELL: If I may. It is showing the difference between the treatment of Leeander Blake and ---.

THE COURT: But why do we care? Even if they did the worst things.

[57] MR. RAVENELL: ---. One of the aspects of Leeander Blake is scared. He ended --- to his making a

statement. When you combine the acts or the comments of Officer Reese, is whether the police were actually designed to put fear into this young man to get him to eventually make a statement.

And when you show that Leeander Blake is dragged out in his underwear out in the streets. And, in fact, when they arrested another young man in the same house and let him put on his clothes, it showed the police knew exactly what they were doing.

He doesn't --- for us. Whether the Court accepts it as to whether it may have had any impact or whether these are proper or these are police tactics designed to try to coerce the young man to give statements. All of what they did. The fact that they treated another young man ---.

THE COURT: Well, is that what the case law says? Is the case law police tactics designed to do that? I thought it was more of a subjective standard, or what Leeander would testify what his feelings were.

MR. RAVENELL: He has already indicated to Your Honor that he was scared.

THE COURT: Right. And I am just saying how can anything possibly be relevant if he doesn't see it. If he didn't observe it.

MR. RAVENELL: I think the point is what were the **[58]** police intending to do? And in fact whether he was scared. You may, in fact, believe that he wasn't scared. It's certainly for you to make the call.

But if you show that the police actions were different as to him versus others, it may, in fact, show that this was their design and their plan.

THE COURT: But I am asking you to enlighten me on the case law. Is the case law now that you need to show that the police had some --.

MR. RAVENELL: No. We don't need to show. Certainly it's what is in Leeander's mind.

THE COURT: That is what I thought.

MR. RAVENELL: And that is what we are going to be arguing to the Court. What the police did to place this in his mind, what the police intent was, certainly may have an impact in that.

THE COURT: Absolutely. I agree.

MR. RAVENELL: I don't think it's limited to only when he is there. But if the Court --.

THE COURT: Well, how can it possibly have an impact on someone if you are not there to see it? That is all I am saying. Unless somebody could communicate to --- police station, do you know what is going on at your house right now. I mean, I don't see how it could possibly effect him.

MR. RAVENELL: Well, we disagree Your Honor, but we **[59]** don't want to beat that.

THE COURT: Okay. Well, sir, you are allowed to go into as much detail as you want though, all those things that occurred that the police up to the time that Leeander is taken

out of the house.

MR. BATES: Thank you, Your Honor.

(Whereupon, the Bench Conference was concluded.)

BY MR. BATES:

Q Ms. Pierce, did there come a time period in which you spoke with a [sic] police officers?

A Excuse me?

Q Did there come a time period in which you spoke with the police officers?

A At the time of the --?

Q That morning. Did you speak with the police?

A Yes.

Q Did the police ask you which room belonged to Leeander?

A Yes.

Q And what did you see the police do at that time period?

A They went upstairs --.

MR. PAONE: Objection.

THE COURT: Okay. Is Leeander in your home at the time you are talking to the police, ma'am?

[60] THE WITNESS: No, n

THE COURT: Okay. I am going to sustain the objection.

MR. BATES: May I be heard, please Your Honor?

THE COURT: Yes.

MR. BATES: Your Honor, --.

THE COURT: Do you want to approach?

MR. BATES: Yes. Actually I probably should.

THE COURT: Okay.

(Whereupon, a Bench Conference followed.)

MR. BATES: Your Honor, if I may. If I may, there has been testimony that Leeander's clothing did not arrive to the police headquarters until almost an hour, an hour and 20 minutes. This came from Detective Johns. Ms. Pierce would testify that, in fact, 15/20 minutes after her son was taken away, the police took clothes from his room and his other two brother's rooms, as well. And they immediately went there. So, his clothes are sitting there someplace.

THE COURT: So, what you are saying is they could have given him his clothes --.

MR. BATES: They could have given it, absolutely, Your Honor.

THE COURT: But, okay, again, does that make any

difference if they could have given him his clothes earlier? They didn't give him the clothes. So you have the best case [61] scenario right now. He is sitting there with no clothes on.

MR. BATES: Fine. That is fine.

(Whereupon, the Bench Conference was concluded.)

MR. BATES: Court's indulgence briefly, Your Honor.

(Pause.)

BY MR. BATES:

Q Ms. Pierce, I want to go ahead and take you straight to the time period in which you were taken to the police barracks. Do you remember that time period?

A Yes.

Q And at that time period the police spoke to you about Leeander wishing to take a polygraph test.

A Yes.

Q Did you ever see Leeander?

A No.

Q Did you talk to Leeander about whether or not he wished to take a polygraph test?

A No.

Q And because the police told you he wanted to take a

test, is that the reason you signed for him to take it?

A Yes.

MR. BATES: Nothing further, Your Honor.

THE COURT: Okay. Any cross examination?

MR. PAONE: No, Your Honor. Thank you. No cross.

[62] THE COURT: Okay. All right. Thank you very much, ma'am. You can step down. Please do not discuss your testimony with anyone.

(Witness excused.)

MR. RAVENELL: That is Defense case for motions, Your Honor.

THE COURT: Okay. There may be some rebuttal from the State?

MS. ALBAN: Yes, Your Honor.

MR. PAONE: Yes, Your Honor.

THE COURT: Okay.

MS. ALBAN: Sergeant Kirchner.

MR. RAVENELL: Your Honor, may I ask for a proffer before the witness comes in what he is rebutting?

MS. ALBAN: Your Honor, he would be rebutting

basically Officer Reese's version of events of how it happened He would be providing a consistent statement from Detective Johns.

THE COURT: Okay. Hold on. Why don't you excuse your witness for just a second, Mr. Paone. Okay. I am sorry. Would you repeat that?

MS. ALBAN: Basically he would be rebutting part of the Defense case was to call Officer Reese, and basically Officer Reese's version was considerably different than Detective Johns' version. Detective Johns stated that he **[63]** immediately reported this to his sergeant. His sergeant would rebut and provide a prior consistent statement of Detective Johns.

MR. RAVENELL: Your Honor, actually, we don't dispute that Detective Johns reported anything to Sergeant Kirchner. In fact, Officer Reese's testimony did not touch at all on whether Detective Johns reported the incident to Sergeant Kirchner. So, that is not rebuttal.

THE COURT: Yes. But Officer Reese said it never even happened.

MR. RAVENELL: Right.

THE COURT: So why would Detective Johns report something that never happened. I think it goes to rebut whether it happened or not, don't you think?

MR. RAVENELL: It may go to what happened. And they can beat up on their own witness' account all they want. It's fine with me.

THE COURT: All right.

MS. ALBAN: I didn't call him.

MR. RAVENELL: I am sure you didn't.

Whereupon,

GREG KIRCHNER

was called as a witness by the State, having been first duly sworn, was examined and testified as follows:

THE CLERK: You may be seated. Please state your **[64]** name and occupation. And spell your last name for the record.

THE WITNESS: Sergeant Greg Kirchner, police officer with Annapolis City Police. The spelling of the last name is K-i-r-c-h-n-e-r.

DIRECT EXAMINATION

BY MS. ALBAN:

Q Detective Kirchner, how long have you been with the police department?

A 15 years this month.

Q What is your current duty assignment?

A Currently I'm assigned as the supervisor for patrol shift two.

Q Was that you duty assignment back in September and October 2002?

A No, it was not.

Q What was that assignment?

A I was assigned as the supervisor of the criminal investigation division.

Q And did you have an occasion to be a supervisor of the detective conducting the investigation into a murder that occurred on Cumberland Court on September 19, 2002?

A I did.

Q And that was Detective Johns who was conducting that investigation.

A That's correct.

[65] Q Let me specifically draw your attention to October 26th. Were you present and around for the arrest of Leeander Blake?

A Yes, I was.

Q Prior to doing the arrest of Mr. Blake, was there a briefing that was conducted?

A There was. That's correct.

Q And what did you tell the officers in that briefing?

A I instructed all officers not to speak to Mr. Blake if we encountered him at his residence.

Q And approximately what time did you encounter him?

A Sometime after 5:00 a.m., I believe.

Q Okay. And, were you present at the scene of his arrest?

A I was at the scene where he was located, yes.

Q Did you see the Defendant at that time?

A I did not.

Q Why not?

A I was assigned to cover the back of the house during the execution of the search warrant. By the time I made it around to the front of the house, the house was secured, he had already been placed in a car and transported.

Q Did there come a time that you went back to the station house?

A Yes.

[66] Q And when was that?

A Maybe 45 minutes after the execution of the search warrant.

Q So the search warrant was being executed at that time.

A That's correct.

Q Okay. At the station do you generally have clothing items for any of the inmates or prisoners that are being held at the station?

A No.

Q Let me draw your attention specifically to about 6:00 a.m. Did you have contact with Detective Johns out on the back lot of the police station?

A I did.

Q And what was that contact?

A Detective Johns came out of the station and approached me. I was standing in the back lot. He came up to me and said that Officer Reese had just made a statement to the Defendant. And he told me what that statement was.

Q Okay. How does he say that this happened?

A He said that he was back in the cellblock delivering the Defendant a copy of his statement of charges. And Officer Reese accompanied him into the back.

Q Is it common to have two officers serve the Defendant with --.

[67] MR. RAVENELL: Objection. Leading.

THE COURT: All right. Rephrase it a little bit.

MR. RAVENELL: Additionally, Your Honor, this is in no way rebuttal.

THE COURT: I guess we are getting right up to it. Are we?

MS. ALBAN: Yes, Your Honor.

BY MS. ALBAN:

Q So he indicated -- what did he say Officer Reese had said to the Defendant?

A He said that he handed the Defendant his copy of the statement of charges and Officer Reese made a statement to the effect of, I'll bet you'll want to talk now.

Q And then what did he say happen?

A He said that he grabbed Officer Reese and pushed him out of the cellblock area. And that was the end of that.

Q Did he indicate to you when this had happened?

A Other than just when he was delivering the Defendant his copy of the statement of charges.

Q Okay. Could you describe his demeanor as he was reporting this to you?

A He was extremely angry.

MS. ALBAN: Court's indulgence. Thank you. No further questions, Sergeant.

THE COURT: Any cross?

[68] MR. RAVENELL: Just briefly.

CROSS EXAMINATION

BY MR. RAVENELL:

Q Sir, did you have any contact with Officer Reese?

A Any contact in what respect?

Q That morning, October 26 of '02.

A He was at the briefing and he was assisting us, yes.

Q Other than seeing him at the briefing and he [sic] going out to the scene of the Defendant's arrest, did you have any other contact with Officer Reese at that time?

A I don't believe so.

Q When you were told that Officer Reese had made these statements, or this statement to the Defendant, did you confront Officer Reese?

A No, I did not.

Q Did you ever confront Officer Reese about the statement that he made?

A I did not speak directly to Officer Reese about that statement.

MR. RAVENELL: Nothing further.

THE COURT: State?

REDIRECT EXAMINATION

BY MS. ALBAN:

Q Did Reese play any role in this investigation?

A None, whatsover.

[69] MS. ALBAN: No further questions.

THE COURT: Okay. Hold on, sir. I am going to have a question. Okay, sir. You just testified, didn't you, that Officer Reese was present at the briefing. Is that right?

THE WITNESS: That's correct.

THE COURT: Okay. And that was the same briefing where you said nobody is allowed to talk to Mr. Blake if he is apprehended.

THE WITNESS: Yes, ma'am.

THE COURT: Okay. And, after Detective Johns told you what he did, your testimony is you never approached Officer Reese about it.

THE WITNESS: I did not approach Officer Reese, that's correct.

THE COURT: Okay. You said that you didn't directly is what I wrote down. So, does that mean that you reported it in some fashion and someone else approached Officer Reese about it?

THE WITNESS: I spoke to Officer Reese's immediate supervisor.

THE COURT: Who is his immediate supervisor?

THE WITNESS: Sergeant Karen Powell.

THE COURT: Sergeant Karen Powell. And do you know whether she took any action about that? Or did she do nothing about it?

[70] THE WITNESS: I don't know. And I don't recall exactly when I spoke to her about that, as well.

THE COURT: But it was obviously before Officer Reese testified in Court, wasn't it?

THE WITNESS: Yes, ma' am.

THE COURT: Do you know if there was a report written that contains that information? That is a report to you from Officer Johns?

THE WITNESS: I had instructed Officer Johns to include the statement in his report.

THE COURT: All right. Thank you. I don't have any other questions. Mr. Paone, Ms. Alban, do you have any question in light of mine?

MS. ALBAN: No, Your Honor.

THE COURT: Mr. Ravenell, do you have any questions?

MR. RAVENELL: Just one.

RECROSS EXAMINATION

BY MR. RAVENELL:

Q Officer, you indicated that you don't recall when you spoke to Sergeant Powell. Could you give us your best recollection of when you had the conversation with Sergeant Powell?

A I know that Sergeant Powell and I spoke about a month ago. I do not know if we talked about this topic prior to that.

[71] Q Now, when you were told by Detective Johns that Officer Reese had made this comment, that you tell us that Detective Johns was upset about it. What was your reaction?

A I was displeased.

Q Since you were displeased and Officer Reese was present, you didn't go up and speak to Officer Reese?

A I did not.

Q Sergeant Powell was present at the location. Why didn't you go speak to Sergeant Powell immediately?

A Why I didn't speak to her, I don't know. I don't recall.

Q Well, you agree she was on duty that night.

A Yes, she was.

Q Right there at the same precinct where you were.

A That's correct.

Q And you did not go and speak to her and you believe it

may have been a month ago when you first spoke to her about this.

A I don't recall if I spoke to her prior to a month ago. I don't recall.

MR. RAVENELL: Nothing further.

THE COURT: Anything else?

MS. ALBAN: One in rebuttal.

RE-REDIRECT EXAMINATION

BY MS. ALBAN:

[72] Q Did you receive [sic] Officer Reese after you were told this information?

A I don't recall if I saw him again that day or not.

Q Okay.

THE COURT: Anything else? Ms. Alban, that was it?

MS. ALBAN: No. That was it.

THE COURT: All right. Thank you very much, sir. You can step down. Please do not discuss your testimony with anyone.

THE WITNESS: Thank you, ma' am.

(Witness excused.)

MS. ALBAN: Your Honor, then I would be calling Corporal Hannon in rebuttal.

Whereupon,

THOMAS HANNON

was called as a witness by the State, having been first duly sworn, was examined, and testified as follows:

THE CLERK: You may be seated. Please state your name and occupation and spell your last name for the record.

THE WITNESS: It's Corporal Thomas Hannon. It's H-a-n-n-o-n. With the Annapolis City Police Department, assigned t [sic] criminal investigation section.

DIRECT EXAMINATION

BY MS. ALBAN:

Q How many years have you been a police officer, Corporal Hannon?

[73] A 19 years.

Q And what is your -- was your duty assignment the same in September and October 2002?

A Yes.

Q Okay. Specifically, let me draw your attention to a murder investigation of a murder that occurred on September 19, 2002, at Cumberland Court. Were you involved in that investigation?

A Yes.

Q Who was the lead investigator?

A Detective Johns.

Q Okay. So what was your role?

A I was second.

Q Okay. Specifically, let me draw your attention to October 26, 2002, did there come a time when you were making an arrest on that date?

A Yes.

Q And who were you arresting?

A Leeander Blake.

Q And where were you arresting him?

A Tyler Avenue.

Q Okay. And, was that his residence?

A Yes.

Q Did you go to the residence?

[74] A Yes.

Q What was your role in the team?

A I was securing the front of the residence from the

outside.

Q Okay. Did you have any contact with Mr. Blake at the scene?

A No.

Q What happened -- did you see the Defendant was in fact arrested?

A Yes.

Q And what happened at that point?

A He was arrested and a patrol officer took him to a marked patrol car, myself and Detective Johns got in our car and followed the patrol car back to the station.

A Okay. So who arrived at the station first?

Q The patrol officer and Mr. Blake.

A Okay. Did there come a time that you had contact with Mr. Blake at the police station?

A Yes.

Q And where was that?

A It was in our booking room.

Q Okay. Did there come a time that the Defendant was of his Miranda rights?

A Yes.

Q And when was that?

[75] A It was 5:11 in the morning.

Q And who was present for that advisement?

A Myself and Detective Johns.

Q Prior to that advisement, did you and Detective Johns tell him anything about the investigation?

A No.

Q Did you tell him that Terrence Tolbert had pointed the finger at him as the shooter?

A No.

Q During that advisement what happened?

A He read his right -- or we read his rights. He advised he understood all the rights. And he said he did not want to talk to us without the presence of a lawyer.

Q Did you make observations about the Defendant's demeanor at that time?

A Yes.

Q And what were those observations?

A He was calm. He was alert. It looked to me that it appeared that he knew everything that we were saying and he understood.

Q Did he appear over tired to you?

A No.

Q Who took the Defendant back to his cell?

A I did.

Q Did you, were you present -- did there come a time that [76] he was being interviewed again by you all?

A Yes.

Q And were you present for that advisement?

A Yes.

Q And could you describe the Defendant's demeanor during that advisement?

A It was the same. He was calm. He was alert. He acknowledged and understood what we were talking to him or what we were saying to him.

Q Did he provide a statement at that time?

A Yes.

Q And was there any hesitation from him about that statement?

A No.

Q There came a time that the polygraph was brought up. Is that correct?

A Yes.

Q Did you all say to him that it would be better if he took a polygraph?

A I don't recall the exact wording that we asked him or said to him.

Q Did the Defendant appear to want to take a polygraph?

A Yes.

Q And what did he -- could you describe his demeanor [77] about the polygraph?

A He appeared to be excited and wanted to take it to, you know, show his innocence.

Q Did you make any promises towards him?

A No.

Q Did you make any threats?

A No.

Q Did you promise him if he took the polygraph he would benefit from it?

A No.

Q Did you in any way mistreat him?

A No.

Q Did Detective Johns do any of those things that I just asked you?

A No.

MS. ALBAN: Thank you. No further questions.

THE COURT: Okay. Mr. Ravenell or Mr. Bates.

MR. RAVENELL: Thank you, Your Honor. Just briefly.

CROSS EXAMINATION

BY MR. RAVENELL:

Q Corporal Hannon, you indicated that you were present when Mr. Blake was arrested at his home. Is that correct?

A Yes.

Q And then you were present when he was advised of his rights under Miranda. Is that correct?

[78] A Yes.

Q And if I understood your testimony, you understood that Mr. Blake had invoked his right to counsel. Is that correct?

A On the first advisement.

Q Yes, on the first advisement.

A Yes.

Q And that is why you decided not to question him any further. Because you understood he had then said he wanted an attorney and you should stop questioning. Is that correct?

A Yes.

Q You told us that you were present later on during the second advisement of rights as well.

A Yes.

Q Okay. Had you remained at the station between the time of the first advisement of rights and the second advisement of rights?

A Yes. I was somewhere at the station.

Q Okay. And when -- were you ever asked by Detective Johns to accompany him to Mr. Blake's cell to give Mr. Blake a copy of the statement of charges?

A No.

Q Okay. Now, the statement of charges were taken out on October 25, 2002. Correct?

A Yes. Immediately.

[79] Q So you had those in possession, in your possession, when you arrested Mr. Blake. Correct?

A Yes.

Q And you had those in your possession when Mr. Blake was first advised of his rights for Miranda.

A Yes.

Q Okay. You did not give those to Mr. Blake while he was sitting in that room with you and being advised of his rights. Correct?

A Correct.

Q Some 30 minutes later did Detective Johns come to you and say that he was now going to give these statement of charges to Mr. Blake in his cell?

A I don't believe he spoke to me, no.

Q Okay. Did you know that Detective Johns was at that point going back to the cell to even give him the statement of charges?

A I knew that he was going to present the statement of charges to Mr. Blake. I didn't know what time he was going to do that, no.

Q All right. Now, if Detective Johns had come to you and asked for some assistance in going back, for example, the cell, Mr. Blake's cell, you would have been available to do that?

A Yes.

[80] Q Okay. Did Detective Johns ever discuss with you that he would be taking Officer Reese, an officer who had no involvement in this investigation, to Mr. Blake's cell with him to give him the statement of charges?

A No.

MR. RAVENELL: Nothing further.

THE COURT: State.

MS. ALBAN: No, Your Honor.

THE COURT: Okay, sir. I have a couple of questions. Hold on for a second. Okay. Corporal Hannon, at the time the Defendant was arrested you said you had no contact with him. Is that right?

THE WITNESS: That's correct.

THE COURT: But did you see him being arrested, since you were in the front?

THE WITNESS: Yes. When he came out of the front door of the residence.

THE COURT: Okay. So you saw him brought out of the front door. You didn't go inside. Right?

THE WITNESS: No, we did not.

THE COURT: Okay. So you saw him being brought out.

THE WITNESS: Yes.

THE COURT: And did you personally have the charging document on your person at the time that he was arrested?

THE WITNESS: No.

[81] THE COURT: Okay. Well, when Mr. Ravenell was was asking you those questions, he was using the word "you." Did you mean when you responded that someone in the police department had the charges, but not you?

THE WITNESS: Yes. But not me. That's correct.

THE COURT: Okay. Do you know who had a copy of the charging document?

THE WITNESS: I believe that Detective Johns had it.

THE COURT: You think Detective Johns had them.

THE WITNESS: Yes.

THE COURT: Okay. My other question is when the issue of a polygraph was raised, was that raised by a police officer or by the Defendant?

THE WITNESS: The police.

THE COURT: Okay. So, the police instituted the idea of a polygraph.

THE WITNESS: Yes.

THE COURT: Okay. And you said you don't recall what was stated to him. You don't remember how it was phrased.

THE WITNESS: I don't know the exact wording. No.

THE COURT: Do you know if you raised it or if Officer --?

THE WITNESS: I did not.

THE COURT: So it would have been Detective Johns.

THE WITNESS: Yes.

[82] THE COURT: But he raised it in your presence, right?

THE WITNESS: Yes.

THE COURT: Okay. And then do you recall if the Defendant asked any questions in response to the idea of a polygraph?

THE WITNESS: No, I don't recall.

THE COURT: Okay. Do you remember the Defendant asking you if you thought it would help him?

THE WITNESS: No.

THE COURT: You don't remember him saying that?

THE WITNESS: I don't remember saying that.

THE COURT: So are you saying he could have said it, but you just don't remember?

THE WITNESS: He could have said it, but I don't remember.

THE COURT: Do you remember any police officer telling him whether a polygraph would be helpful to him or not?

THE WITNESS: No.

THE COURT: Okay. And when you say, "no" again are you saying you just don't remember? Or you know no one said that.

THE WITNESS: If anybody asked him, it would have been Detective Johns. And we were the only two that spoke to him while he was there. So I would say, no, that no other **[83]** police officer would bring up that idea.

THE COURT: Okay. But I mean, including Detective Johns. That is my question. Do you remember whether Detective Johns told him that it would be helpful to him to take a polygraph?

THE WITNESS: I don't if Detective Johns did.

THE COURT: Okay. Do you know if you did?

THE WITNESS: I know I did not.

THE COURT: You know you didn't. Okay. And just so I am clear. If Detective Johns decided at some point while the Defendant was in his cell to take him the statement of charges, you don't know anything about that. Is that right?

THE WITNESS: That's correct.

THE COURT: Okay. All right. Any questions in light of mine?

MS. ALBAN: Court's indulgence.

THE COURT: Okay.

(Pause.)

MS. ALBAN: No, Your Honor.

THE COURT: Okay. Anything else, Mr. Ravenell?

MR. RAVENELL: Nothing, Your Honor.

THE COURT: Okay. Thank you very much, sir. Sir,I am ordering you not to discuss your testimony with anyone.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

[84] THE COURT: Any other witnesses, State?

MR. PAONE: Your Honor, could we possibly take a five minute recess before we make a decision on who to call.

THE COURT: Well, it's eight minutes of 12:00. Do you just want to break for lunch and come back? Because I know that I am not going to get the whole arguments in in eight minutes.

MS. ALBAN: Okay. That would be fine, Your Honor. And, then if we --.

MR. RAVENELL: ---.

THE COURT: Okay. I mean is that acceptable to everybody?

Mr. RAVENELL: Yes, Your Honor.

MS. ALBAN: That would be fine, Your Honor.

THE COURT: All right. We will come back then at 1:30.

MR. PAONE: Thank you, Your Honor.

(Luncheon recess was taken.)

[85] AFTERNOON SESSION

THE COURT: You can be seated. You would mind calling the case, again, for the record.

MR. PAONE: No, Your Honor. It is State of Maryland versus Leeander Jerome Blake, K-2002-1254 and 2417, those are the numbers I have. For the record, my name is Fred Paone on behalf of the State.

MS. ALBAN: Pamela Alban also on behalf of the State.

MR. RAVENELL: For the record, Your Honor, Ken Ravenell and Ivan Bates on behalf of Mr. Blake, who is present.

THE COURT: Okay. Thank you. Are we ready then for argument?

MS. ALBAN: Your Honor, I have just that one brief rebuttal witness we did in fact decide to call him.

THE COURT: Oh, that is right. I am sorry. Okay.

MS. ALBAN: So if we could get Detective Johns.

Whereupon,

WILLIAM JOHNS

was called as a witness by the State, having been first duly sworn, was examined and testified as follows:

THE CLERK: You may be seated. Please state your name and occupation and spell your last name.

THE WITNESS: William Johns. I am a detective with the Annapolis police department. Last name is J-o-h-n-s.

[86] DIRECT EXAMINATION

BY MS. ALBAN:

Q Detective Johns, I am going to draw your attention to your first advisement of the Defendant, Mr. Blake. Did you provide him with any information regarding the case prior that advisement?

A No, I did not.

Q And did you tell him that Tolbert had told you that he was the shooter?

A No, I did not.

Q Did you at any time say all of that to him?

A No, I did not.

Q I want to certify for the Court the number of contacts you had with Mr. Blake back in his cellblock area. How many

times did you go back to the cellblock area and have contact with Mr. Blake?

A I believe it was just --.

Q Well, let me ask you in a different way so that it is easier. My understanding is that at some point Mr. Blake was placed in the cellblock. Is that correct?

A That's correct.

Q And who placed him there?

A Corporal Hannon.

Q Okay.

MR. RAVENELL: Objection. Your Honor. This is not [87] rebuttal. The Sergeant testified to in direct by this officer.

THE COURT: Okay. Is that inconsistent with anything?

MS. ALBAN: No. It's not inconsistent with anything he said. But it's inconsistent with what the Defendant says.

MR. RAVENELL: Your Honor, rebuttal is not based on whether if the Detective said A and the Defendant said B that the Detective gets to come back and say A again. That is not rebuttal.

Rebuttal is only if we touched on a different new area than the officer and he comes back to rebut. He has already given his testimony about his contacts during his direct

examination and cross examination.

THE COURT: Oh, okay. I see what you are saying. It's consistent with what he said first.

MR. RAVENELL: Right. He is only going to say what he said the first time.

THE COURT: I will sustain.

MS. ALBAN: Okay.

BY MS. ALBAN:

Q Did Mr. Blake, there came a time that you did in fact take a statement from Mr. Blake. Is that correct?

A That's correct.

Q And in that statement did he refer to the comment that Mr. Reese made to him at any time, from Officer Reese?

[88] A No, he did not.

Q The timing of the service of the statement of charges, was that done for a tactical advantage?

MR. RAVENELL: Objection, Your Honor.

THE COURT: All right. I will sustain it.

MS. ALBAN: Okay. No further questions.

THE COURT: Okay. Any questions, sir?

MR. RAVENELL: I have none.

THE COURT: Okay. Thank you very much, sir. You can step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Sir, I am ordering you again not to discuss your testimony with anyone.

THE WITNESS: I understand, Your Honor.

(Witness excused.)

THE COURT: Okay. State, just give me one minute. I want to finish reading this application. (Reading.) Okay. All right. State, what would you like to say in argument? I should ask first, do you have any, sir, rebuttal?

MR. RAVENELL: No, Your Honor.

THE COURT: All right. State, your argument then.

MS. ALBAN: Your Honor, basically, my understanding of the law in this area we need, the issue here is whether the confession that was made by the Defendant was voluntary. And there is a three process inquiry. We need to decide whether it **[89]** was voluntary under the non-Constitutional law in Maryland. Whether it was voluntary under due process of the Fourteenth Amendment, and Article 22 of the Maryland Declaration of Rights. And whether it was elicited in accordance with Miranda.

Well, first, the non-Constitutional voluntariness of the right. It's a two step inquiry. It's my understanding that the

Defendant has to have the mental capacity to know and understand what he is saying.

The standard under that was whether the Defendant was so far deprived of his sense of reason as not to be responsible for what he may have said or done. I don't think that there is any indication in this case here that that was the fact.

In fact, the testimony has been to the contrary. That he is an intelligent youth. That he had goals. Intended to go to college. And that there was no indication of any mental deficiency at the time of the confession.

So having met that step, it's time to decide whether the statement was voluntarily given. And the test for that is the totality of the circumstances test. And the State must meet that by a preponderance of the evidence.

I think case law is pretty clear in some of the factors that you need to look at. First, you look at the Defendant's age, education and intelligence. The Defendant was **[90]** 17. He was actually 17 and four months, almost five months old at the time.

The case law indicates that the juveniles, it's not a separate test. You still apply the totality of the circumstances. In other words, 18 is not necessarily a bright line rule where they suddenly become capable of making a voluntary statement.

A lot of the cases found that juveniles who were much younger, or even younger than the Defendant, were able to still make valid waivers of their rights. I also think that what the Court can consider in this aspect is the statute that governs the offense the Defendant is charged with.

Under the statute, the Defendant could not have been charged as a juvenile. He, in fact, must have been charged as an adult because he was 17 at the time he committed this. And there was no option to even to waive him back to juvenile.

And I think the Court can consider that he is old enough to be charged as an adult, he is old enough at that point to be considered an adult for this proceeding and for any waiver and voluntariness.

When we look at the education. He has completed his tenth grade. Again, some of the case law had much younger or lesser education. He was actually in the 11th grade and didn't take any special education classes. I think if you look at the intelligence, there is no indication that there was any mental **[91]** disability. He was able to hold a normal conversation with the police. His responses were appropriate to the questions that were asked. His probation agent told you that he was an intelligent youth and that he had not had any special education as well.

And in fact, both the Defendant and his mother at some point said that he was intelligent. And that he could make good choices. Or who could succeed when he chose to do so. He talked about a career and about colleges. And think it is also interesting that he had independent thought. It wasn't that he was just following the rules of probation when given an opportunity to be in counseling. He actually opted, he said this is doing, this is working for me. Let me continue it.

So he is clearly somebody who is able to weigh the pluses and minuses of his situation. In no way do I think any of these factors at this point indicate that this waiver was not voluntary or that this statement was not voluntarily made.

I think then the next factor you look at is the Defendant's mental and physical condition. I discussed the mental condition above already. Physically he indicated that he was sober. Both by the observations of the police and the statement. He was not on drugs. He said he may have had a sip of alcohol around 10:00 or 11:00 p.m. that evening, but that that was it.

He appeared normal physically. The only complaint **[92]** was that he may have suffered from some asthma, but it was not effecting him during the time. He also did not appear to be unduly tired to the officers.

Now there is two different versions of what happened. Corporal White testified that he had, the Defendant had reported that he had actually been asleep until 4:30 in the morning until the police had gotten there. And that he had even taken a nap the day before.

That would prove that he was fairly rested at that point. Even if you take the Defendant's version that he was up all night watching TV, the Defendant stated that was a normal behavior for him. And that he operated on that level of sleep regularly. And when I say operated, he worked and he held a job and he went to school. He was a busy young man.

I think you get to look at his demeanor as well at this point. He was clam [sic] and cooperative throughout the interview. He was polite. The testimony was that he was eager during the second interview. And eager to take a polygraph. He exhibited no hesitation at that point.

And, again, I would think that this factor would not indicate that it waives [sic] towards a finding of involuntariness at this point. I think it would dictate towards voluntariness and

a valid waiver.

The Court then next gets to look at the Defendant's background and the Defendant's experience. The Defendant had **[93]** two prior contacts with the police. This was not his first time seeing a police officer. Dealing with a police officer. Granted, it was the first time that he had been advised. But, he was exposed in life. He had seen Miranda on TV.

He had been through probation. He was on probation for five to six months and he was considered a model probationer according to the probation agent.

In looking at the Defendant's experience, he held jobs. He held several jobs. And he was working while he was attending school. And he was working in various capacities. When you look, he was operating registers. He was in charge of sales. He was in charge of stocking.

All of these are representative of some skills that would require the Defendant from his experience that he can apply into whether it's a voluntary finding. And, again, I don't think any of that weighs heavily against a finding of a valid waiver of voluntariness.

The next thing the Court can look at would be the length of the interrogation. I think it's clear the Defendant was arrested shortly after 5:00 a.m. And when Corporal White testified he said he started the polygraph at approximately, he was called in, he got to the station about 9:00 a.m. And he said the whole process lasted about two, two and a half hours. So the outside parameter would be 11:30 in the morning.

So we are talking about less than six and a half **[94]** hours, the entire process took. But it was clear from the

testimony that the longest interrogation, if you will, the longest interview was less than an hour.

So, at no time was he subjected to questioning by the police for any longer than an hour. It's not an excessive length of time. Even the six and a half hours is relatively brief in looking at a lot of the case law.

The manner of questioning is another factor that the Court can consider. And the testimony from both Detective Johns and Corporal White were that they were very open ended questions. They wanted the Defendant to tell them his version of events. They would ask him follow up questions to clarify some details. But otherwise they basically let the Defendant dictate the interview.

Their voices were in a normal conversational tone. Their voices were never raised. It was not a very heated, in your face type of interrogation that would weigh towards involuntariness. In other words, --- very conversation [sic] and it would indicate voluntariness and a valid waiver.

Another factor would be the number of officers present. At no time was the Defendant in a room during an interrogation or a questioning or a waiver with more than two officers. At once it was Corporal Hannon and Detective Johns. And at the other, at one point, Corporal White and Detective Johns. And then it was just Corporal White.

[95] And at those times no one had weapons on them. They weren't -- the Defendant wasn't in handcuffs. All of that I think you get to take a look at and all of those factors at this point would weigh towards voluntariness.

There was no physical mistreatment of the Defendant

even during the arrest. There was no physical intimidation. And then the psychological pressure. The State would proffer that there is no evidence of psychological pressure. And I am aware the Defense is arguing that Officer Reese's comment may have exerted pressure on the Defendant.

The question is whether the Court needs to decide is whether Officer Reese's comment over bore the Defendant's will to the extent that the confession is no longer voluntary. The Defendant also raised that they were promising, that they said that the polygraph would help him. And that is the other issue that we need to look at.

But basically what this is is a totality of the circumstances. And no one factor is controlling in it. And I would submit to you that every other factor at this point weighs that this waiver was knowing and voluntary and intelligently made. And that this statement was voluntary.

And I think it is at this point we need to take a close look at Officer Reese's statement and whether a polygraph promise was made.

Okay. Officer Reese's statement. In looking at it **[96]** I cannot ignore the elephant in the room. There are two very different versions of what happened. Detective Johns' version and Officer Reese's version.

I think there is little doubt in this Court which version is accurate. It would be Detective Johns' version. If Officer Reese's accurate, it would be great. We wouldn't be here. There would be no issue. There would be no improper conduct whatsoever.

So what I think we need to look at is Detective Johns'

version. It was corroborated by his Sergeant, by himself, and even the Defendant said that it happened along the same lines that Detective Johns said.

Basically, as the statement of charges was being served, and as they were walking away, Officer Reese said to the Defendant something to the effect of that you want to talk to us now. Johns immediately reprimanded him and said to him, loudly and forcefully, he doesn't want to talk to us. We cannot talk to him. Or something to that effect.

He also pushed him out of the way or got him to leave the cellblock immediately. He said it was important for him to say this loudly and forcefully because he didn't want to hear anything that the Defendant was saying at that time because he knew it wasn't such a great comment.

He wanted Reese to shut up, he said. And he wanted the Defendant to hear him say this. So it had a triple effect. **[97]** What the Court needs to decide is whether this is an improper inducement. And whether the police conduct, I am going to combine this at this point, because I think it would go under the deciding whether this is voluntary under due process. Because the due process analysis deals with whether the police conduct was overreaching. And I think for the analysis is overlapping at this point.

Basically, the key case in police overreaching or improper police conduct is, of course, as the Court is familiar, Colorado versus Connelly. And, it's been applied through State cases from the Supreme Court. And, basically, the State would submit to you that Officer Reese's comment does not reach that level of police overreaching.

In that case they said that there were certain

interrogation techniques that are so offensive to a civilized system of justice that they must be condemned. And an exclusion without police misconduct would serve no purpose. They would not enforce Constitutional guarantees. There basically means that there would be nothing to deter.

[98] So, in other words, we have to have such gross conduct that it would offend, so offensive to a civilized system of justice that it must be condemned. The case goes on to say that there is actually a public interest in placing probative evidence before juries for purpose of arriving at truthful decisions about guilt or innocence.

So, in other words, it's cautioning this approach, this hard line approach of saying this police conduct must really be bad conduct. We have to be doing something by doing this rule. Because there is a public interest in getting as much evidence before the jury as possible.

Basically, what we need to decide is whether this is an improper inducement. The test as to whether it is an improper inducement is whether the Defendant's will was over borne in such a way [as] to render his confession a product of coercion. There has to be a causal connection between the coercion and the confession. It has to be the direct result of it.

I would submit to you that Officer Reese's comment does not amount to the level of an inducement. There is no threat associated with him. There is no, if you don't talk to us you are going to fry. There is no promise associated. Well, you better talk to us now so we can help you.

There is no quid pro quo. And the case law recognizes neutral comments made by the police. They exist and they have several different examples of what would constitute some

neutral comments.

Merely telling the Defendant to tell the truth would not be considered an inducement. I want you to tell me the truth. The truth would hurt no one. Get if off your chest. There is no sense in lying. Tell the story in your own words. **[99]** Or a suggestion to put it in writing. None of those would constitute an inducement. They are considered neutral comments by the Court.

THE COURT: Were those all in the context of a situation where a defendant had already said I don't want to speak. I want an attorney.

MS. ALBAN: Not all of them. But I will address the reinitiation of contact later. Our position would be that that comment does not rise to the level of police misconduct that is contemplated by Connelly and by the improper inducement to warrant suppression at this point.

What you need to do, the test to determine whether an inducement existed, is you need to take a look at the facts surrounding the inducement and the confession. You can look at the time that may have elapsed or any other possible intervening factors that may have occurred.

And you can look at whether it is referred to. The Defendant at no point referred to Officer Reese's comment in his conversations with the Detective. I know that he --.

THE COURT: What is the time period now? Between the time when that comment was made and the time when he is apparently said, can I still talk to you, what is that time period?

MS. ALBAN: According to Detective Johns is it was 28 minutes. It was, I served the statement of charges at 6:00. **[100]** At 6:28, I gave him the clothes. And at that point the Defendant reinitiated contact. And that is when the Defendant asked. According to the Defendant, I believe, it would be approximately that time period. He said that there was something in between -- I am sorry.

The reinitiation of contact. Yes. It was like ten to 15 minutes to the clothes and then ten more minutes until he got, until supposedly Detective Johns reapproached him. So, it's approximately 25 minutes if you look at his version and according to ours it's 28. So we are looking at the same ballpark.

I think it's important to note that he didn't reference that comment to Officer Reese's comment to Detective Johns in the statement, when he was providing the statement. I know he said on the stand several times that the reason I did this was the comment. But when he was speaking with the police that day, there was no reference to that comment.

I think it's important to note that his demeanor did not change. That he was still calm and he was still cooperative. The only change may have been that he didn't have any hesitation about talking to them. In fact he wanted them to hear what he had to say.

I think you get to look at that there was a correction immediately in front of the Defendant of **[101]** Officer Reese's behavior. He said we cannot talk to the Defendant. He does not want us to talk to him. The Defendant heard that. I think that gets to be considered by the Court.

And the other huge argument that the State has was

that there is this intervening factor that he read the statement of charges. He figured out at this point that his friend has fingered him. He has put the gun in his hand. Him pulling the trigger. Him taking the keys. Him running over the victim.

And according to the Defendant, that is not the way that it happened. In fact, his friend is the one who did all of those. And he testified to the Court that it made him angry to read it. And that he felt betrayed.

And that it was important for the police to know his version of what happened. That Mr. Tolbert was actually the main culprit of what happened here and that he wasn't the one who had done it.

And it was actually very important to him to have them believe him. And I would argue to the Court that this is the intervening factor that takes away from Officer Reese's statement.

The further attenuation that we get is the clarification that Detective Johns does when the Defendant reinitiates contact. He said, have you changed your mind. And he said yes, I have. And they went even through the whole, **[102]** they advised him again, extremely thoroughly, going through. Indicating he understood. The Defendant told you he understood each right that he was advised.

So he indicated he understood each right. He was readvised thoroughly. That helps attenuate anything. The first advisement the Defendant felt very comfortable invoking his rights. The second advisement he is readvised again. He is understanding. But he has it back in his head that his buddy is the one who told them.

The other thing is they go through the statement and at the end they ask the clarifying questions again. Initially you didn't want to talk to us. Yes. And have you changed your mind. Yes.

THE COURT: That is in writing, right?

MS. ALBAN: Yes.

THE COURT: Let me find that. (Reading.)

MS. ALBAN: It was the one that was redacted, I believe Exhibit 2.

THE COURT: Okay. "Did you at first say you did not want to talk to us? Yes. Did you later change your mind and ask if you could talk to us?" Exhibit 5.

MS. ALBAN: Oh, Exhibit 5. I am sorry. I knew it was one we needed to redact.

THE COURT: Okay. Thank you.

MS. ALBAN: So, I would argue that the Defendant's **[103]** will was not overborne by the statement that Officer Reese made that there were the intervening factors and there was sufficient attenuation at that point. Even if you find that his -- that Officer Reese's --.

First we are saying Reese's didn't amount to any inducement. But if you find that it was an improper statement, then the Defendant's will was still not overborne. There was not that causal connection that they need that there is this attenuation and the intervening factor.

Now what we need to do is then look at the polygraph and the reinitiation. It am going to group these because again there is a difference in story. And so initially I will talk about them together.

Basically I think when you are examining these two issues it's going to boil down to credibility for the Court. Because there are two different statements. He is saying about the polygraph, they said, he asked can it help me. And they said yes.

Their testimony is we at no time promised him any leniency with regard to that polygraph or any benefit. I asked Detective Johns. I asked Corporal Hannon and Corporal White. And none of them said that they said that.

Now, when asked whether the Defendant asked them about a benefit, that is when they said they can't recall whether he asked. But they didn't promise him anything. They **[104]** were emphatic about the lack of promising him anything.

THE COURT: Let me ask you a question though. Although I am certainly aware that there is no necessity in most motion hearings for the Court to hear what the statements were, were actually made. In this case, do you think I need to know at what point he actually said anything incriminating? I mean, I don't know. Do I?

I mean, I don't think I have a document. And I don't think I have testimony about whether after he changed his mind and started talking to the officers. I assume at the Annapolis police department he said anything incriminating. Maybe he said things that were exculpatory.

And I don't know whether he only made an

incriminating statement at the State police barracks pursuant to the polygraph test. Of course, I don't really know if he ever made an incriminating statement. I am just assuming he did or we wouldn't be here trying to suppress it.

But, do you see my point? In most cases it's really not important for me to know what the person said. And in this case, do you think I need to know at what point in this scenario he ever said anything that was incriminating?

MS. ALBAN: I don't know how to answer your question.

THE COURT: Do you see my point?

MS. ALBAN: Yes.

[105] THE COURT: Because it seems to go to what might have been going on in his mind if we are talking about an inducement. You know, like right after, is it that first statement? Is it after Officer Reese's statement that he all of a sudden spilled everything? You know, made all these incriminating statements.

Or did he say nothing incriminating and was it only at the time of the polygraph that he made an incriminating statement. Because then we have a long period of time in between. We have Officer White Mirandizing him all over again. We have his mom in the building signing a waiver. It's sort of a different situation.

MR. RAVENELL: Your Honor, if I may submit --.

MS. ALBAN: Because, can we confer? Because I don't want to say anything that ---.

(Pause.)

MR. RAVENELL: Your Honor, I think we could stipulate that there were incriminating statements made at each session. And that may be progressively worse as the --- along.

MS. ALBAN: I believe that Corporal White, we could even rely on his testimony that the Defendant provided this version and he added a few details.

THE COURT: I knew I heard him say he added a fact. But I didn't know whether it was incriminating or --.

MR. RAVENELL: I think we can agree, Your Honor, **[106]** that there was evidence that the Government would use against him from both statements.

MS. ALBAN: And, yes. In all of it.

THE COURT: All right. Go ahead.

MS. ALBAN: Okay. I guess I was talking about the credibility because there are two different versions. I again feel that the State has easily met the preponderance of the evidence. And I am not contesting -- I started to talk about the polygraph. The Defendant's version and I talked about the State's differing version where no benefits and no promises and no promises of leniency. There were no threats at any time. So, that would be the State's --.

And the Defendant's was, if I asked that question. They were emphatic. They couldn't remember whether the question was asked. But they were emphatic that they didn't promise him anything.

The other aspect of this credibility thing would be the reinitiation of contact with the police. We are not contesting that the Defendant invoked his rights. We are not contesting it was his right to an attorney. That puts us in a different ballpark than if he just said I don't want to talk to you. We are conceding that.

And basically what has to be shown at that point, the police have to absolutely stop questioning and that either the Defendant has to be given an opportunity to consult or that **[107]** he reinitiates contact.

And it's our argument that at no time did the police reinitiate questioning. But that the Defendant was one who had done that. There is specific case law on the statement of charges. Serving a defendant with a statement of charges does not constitute a reinitiation of questioning.

THE COURT: What case is that?

MS. ALBAN: Connover and White.

THE COURT: Do you have a cite for Connover?

MS. ALBAN: Yes, I do. Court's indulgence for one second. (Reading.) Okay, the reinitiation. Your Honor the White versus State is a new case. And that was citing Connover. That was decided April 15, 2003, by the Court of Appeals. I am going to ask Mr. Paone if he would look through this and find the cite for Connover. -- and I would provide the cite to Connover.

THE COURT: Okay. That is fine.

MS. ALBAN: Okay. I think Johns' testimony was

very clear in that he had no intention of questioning the Defendant. He testified that when he served him with the statement of charges he didn't intend to question him. He testified that when he was delivering his clothing he had no intention of questioning him.

I think you can take a look at Detective Johns and -- well, I guess let's look at the two differences. He was **[108]** very clear that the Defendant was the one who asked him if he could talk to him. The Defendant's version is different. He said that Johns came back some other time altogether and went up and asked him, do you want to talk to me. And at that point he said, I can still talk to you?

THE COURT: Oh, he said, do you still want to talk to me the first time. And then later he said do you want to talk to me.

MS. ALBAN: Right. And, then he said, I can still talk to you. And they both said, yes, yes. And that is how it happened. He said he even took him immediately out of the cell at that point. Where Johns' version he even left him there for another ten minutes while he got the key to the room and got Corporal Hannon.

If you look at the advisement, it was 6:28 when he gave him the clothes, that this conversation took place. The second advisement didn't take place until 6:40. The time on it noted by Detective Johns and Corporal Hannon.

The Defendant's version I would submit to the Court does not exactly make sense. I am not quite sure why Johns would make a big deal about an off handed remark that Officer Reese would say. I mean he admonished him. He pushed him

out of the cellblock. He immediately went and reported it to his supervisor that this had happened.

And then go back less than a half hour later, **[109]** approximately a half hour later, and then directly violate what he was telling Reese he couldn't do. Do you want to talk to me, or do you still want to talk to me. And it doesn't make sense why he would do that.

I would submit to you that you need to take a look at Detective Johns and his credibility. Detective Johns came before this Court and he was extremely candid in both the writing of his report and his testimony in the Court. He didn't shade it.

Officer Reese made a comment. He told you how it went down. He said when he didn't know the answer. He told you he didn't know. I think you can look at Detective Johns as a very credible witness. He was also corroborated by Sergeant Kirchner, by Corporal Hannon. And at times even by the Defendant, and Corporal White.

So there was a, I think as you look at it as a whole, you can take a look at his credibility and kind of evaluate that into as you are evaluating what happened with the reinitiation.

If you believe the Defendant, that Detective Johns went back, then there is a problem. But then I would also argue to you at that point, no, no. There is a problem if Detective Johns went back and said do you want to talk to me. At that point that becomes part of the problem as to what the case law is trying to prevent the badgering of the police and **[110]** all of that.

But, I would submit to you it wouldn't make sense for him to yell at somebody for an offhanded remark and then to go do the direct thing he was trying to tell him not to do.

In the polygraph, in talking about the polygraph, the waiver, I would like the Court to look at the waiver. I think Defense counsel was trying to say that the waiver that Ms. Pierce signed --.

THE COURT: Is that in evidence, or it's not?

MS. ALBAN: I believe that it is.

THE COURT: Oh, here it is, okay.

MS. ALBAN: Basically, what -- as I looked at it and as I understood when I was talking to Corporal White, it's a waiver of liability. If you look at the last paragraph on it, it says that you are not going to hold Maryland State police liable for anything that might occur during the polygraph.

If he was 18 years old, he would still need to sign that. And then he would still be advised of his rights. That form is just a procedural thing that MSP has to get them out of any liability of anything that might happen during this polygraph. And that was what his mom's role was there.

Basically Corporal White then set down with the Defendant. He talked to him. He explained that form to him. Even to the Defendant, and the Defendant understood. And he signed.

[111] He also then advised the Defendant of his Miranda rights. So here is another advisement. Here is even further attenuation from Officer Reese's comment. And at that

point he did indicate he wanted to talk. And Corporal White, he testified, he was even eager at that point to talk.

THE COURT: How many advisements do we have? Is that three?

MS. ALBAN: Three.

THE COURT: Three or four? Three?

MS. ALBAN: Three total. The first one where he said he didn't want to talk. Then --

THE COURT: Another one --.

MS. ALBAN: And then one by White. So there are two different advisements, two different statements, after all of that. And I would argue that all of that is attenuation. There are also factors in attenuation if you are looking at each statement individually.

Officer Reese is the one who made the improper comment, if the Court find it's improper. He wasn't the one who was present in the interrogation. The interrogation was Corporal Hannon, who the Defendant had fond memories of with Detective Johns.

It was not the hostile officer that made the comment. So, again, that is attenuation there. Again, he was advised. Again it was clarified. There is even further **[112]** attenuation. We are talking about that was at 6:30. We are going all the way until 9:00 o'clock until they could get that polygraph set up. That is a time. There is time for him to request. Time out for him to deliberate on what he wanted to do.

And it's a different officer completely. It's a different environment. It's in a different room. It's down at the MSP barracks.

I would argue to you that there is plenty of attenuation at that point for that offense. And if you look at it and if you look at the statements, it doesn't make sense and I guess in talking about credibility, it doesn't make sense that they would tell him up front something and then -- about the investigation.

Basically, the Defendant found out. I would submit that Detective Johns and Corporal Hannon said to you the Defendant found out about his friend ratting him out back in the cell. The Defendant says he found out ahead of time. They were both adamant, no, we didn't tell him anything about the investigation. I mean they wouldn't want him to know what they had. They would want him to tell them what they had.

Even if you believe the Defendant, he didn't know at that point that he was going to be facing death. He didn't know all of the details that Tolbert will have provided for the police. So even if you believe the Defendant, when he gets **[113]** back and he gets that statement of charges, he gets a whole lot more information.

And I think when you look at his behavior after that in light of that statement of charges that he had the opportunity to review, it's very consistent to that being a motivating factor. It's very important for him to get his version out. It is very important for him that the police believe him about his version as opposed to Tolbert's version because it's considerably different.

I think when you look at the totality of the circumstances that you would find that there was a valid waiver of Miranda

both times, the second time and the third time. That the statement was made voluntarily when you look at all of the factors involved.

And I would think that you would find that if -- even if you find that he had an improper inducement, even if you find Officer Reese's comment was improperly induced, I think that you would find that there was an intervening cause or proper attenuation that occurred prior to him making any incriminating statements.

And I think then looking at the totality of the circumstances, these are voluntary statements after valid knowing intelligent waivers of Miranda. Let me check with Mr. Paone and I think they are still trying to find the cite.

THE COURT: I may have that in my little -- I **[114]** probably already have that case.

MS. ALBAN: There was another case in my file on that. It was Ratavosky versus State. But that was reinitiation and I just need to find the Connover because I do know that I saw that.

THE COURT: Well, you can get it for me. All right. Thank you.

MS. ALBAN: Thank you.

THE COURT: All right. Mr. Ravenell or Mr. Bates.

MR. RAVENELL: Thank you, Your Honor. First thing, if I may, bore you, discuss some of the facts that I think are important to the argument before we get into the law.

Let's start with Detective Johns' testimony. Reviewing the transcript that we ordered, there are certain things that I think are important. And I want to highlight to the Court before I begin to argue to the Court the law.

One is this, is that Detective Johns has testified that he understood when Mr. Blake said he wanted an attorney that he was invoking his right to counsel. There is no dispute to that. In fact we now have that from Corporal Hannon as well. That they both understood that he is invoking his right to counsel.

Secondly, we know that Detective Reese has told us, excuse me, Detective Johns has told us that he is not sure why Officer Reese accompanied him to the Defendant's cell. We know **[115]** that Officer Reese was only involved in this case to transport Mr. Blake from his home to the station. And these are things I am telling you right now from Officer Johns' testimony.

Officer Reese had no involvement in the case for the 30 days or so preceding this investigation or interrogation on October 26, 2002. Detective Johns agrees that it was not necessary in any way for Officer Reese to accompany him to Mr. Blake's cell to give a statement of charges to Mr. Blake.

He said that Mr. Reese made the statement to Mr. Blake as Detective had given Mr. Blake his statement of charges. And, in fact, had commented on those statement of charges. We know from seeing that document that the first thing on that page on the list of the statement of charges, which I believe was one of our earlier Exhibits. Is it says the death penalty.

Now, we also know the Defendant did not face the death penalty, as we now know. But, what is important is what

the Defendant was being told on that date. For some reason he is being told that he faces the death penalty when he did not.

THE COURT: Let me interrupt you.

MR. RAVENELL: Yes.

THE COURT: Why did you just say made a comment about it. I don't remember that from my notes.

MR. RAVENELL: Who made a comment about it?

THE COURT: I thought you just said Officer Johns **[116]** said that he handed him his statement of charges and made a comment about them. Are you referring to Reese's comment?

MR. RAVENELL: Oh, I am sorry. No, Officer Reese made a comment at the same time. Not Officer Johns made a comment. Officer Johns passed the papers and as he passed them to Mr. Blake, and Mr. Blake is looking at them, Officer Reese made a comment. I am sorry if I wasn't clear.

We also know that Detective Johns admits that Reese's statement was, as he termed it, "somewhat confrontational." But we also heard the voice that he used. You heard Detective Johns testify that as they walked towards the cell, how Officer Reese was speaking to him was quite different than how he then spoke to Mr. Blake.

We know that Detective Johns had the statement of charges. He had that statement of charges since October 25, 2002. We know from he and Corporal Hannon that that statement of charges was in the possession of Detective Johns maybe even at the scene, but certainly when they came --. And

the scene being at Mr. Blake's home.

But certainly when they came back and first interviewed him. That statement of charges was there and could have been presented to Mr. Blake in that interview room when Mr. Blake said that he wanted counsel and when Corporal Hannon, an investigating officer on the case, second in charge, was there and present. But we know that it wasn't done then.

[117] We know that 30 minutes after Mr. -- even 30 to 20 minutes after Mr. Blake is put in his cell, and we take it again from Detective Johns' testimony, 30 minutes that he was put in his cell, I say 35 minutes. Because according to Detective Johns at 5:25 a.m. Mr. Blake is put in his cell. And at 6:00 o'clock he went in and took in the statement of charges.

So, we know that 35 minutes later, under his version, for some reason he then decided to walk in with Officer Reese in tow to give the statement of charges to Mr. Blake.

Additionally, from Detective Johns, we have testimony that approximately 28 minutes after this outburst with Reese, that is when Detective Johns goes in to give the clothes. And now we have Mr. Blake agreeing to having an interview with the police.

Additionally, we have Detective Johns who agreed that prior to, and this is his testimony, prior to Reese's outburst, Mr. Blake had made it clear that he did not want to talk to the police. Detective also testified that other than Reese's outburst, and the giving of the statement of charges, nothing else happened with Mr. Blake prior to that, when Mr. Blake agreed to speak with the police. That is his version.

Additionally, the Detective agrees that Reese's **[118]** comment suggested that Officer Reese knew that Mr. Blake had invoked his right to counsel. And could not explain why in the world Officer Reese would know that. An officer's whose involvement at best was to transport Mr. Blake from his home to the station.

He testified, Detective Johns, and he could not say, in fact, when he said when he spoke to his supervisor in the back it was only detectives out there. And for some reason we now know that somehow Officer Reese is told, had to have been told based on the comment he made, that Mr. Blake had invoked his right to counsel.

Detective Johns also admitted on the stand that he was concerned by his actions and that Officer Reese's comments would in fact violate Mr. Blake's request for counsel. And an aside, Your Honor, that we can pen right here is that if the Detective was that concerned by it, it's certainly not far fetched that Mr. Blake would be effected by those same comments, that same comment.

To go further, the Detective said that he was interested in what caused Mr. Blake to change his mind. But he didn't ask the question. You know, the State so far, and I will take it aside, has made a comment that Mr. Blake didn't tell the police anything about Officer Reese's comment when he made the statement. But what is also shocking and amazing here is that no one asked him.

[119] You have a detective who said that I was concerned why he changed his mind. But I did not ask the question. And then we have, Judge, the detective underwrote, says, I don't know whether Reese's comment had any impact on Mr. Blake in changing his mind.

They don't know. And the reason they don't know is because they didn't ask. But it certainly again points to the fact that if they are not sure whether it had an impact on him, it is their burden to convince the Court that it had no such impact on him.

Although the detective, as I said, was so concerned he didn't ask the question. The last two point I make, Your Honor, is that as to the polygraph and the statement, we know that there was a waiver obtained. Whatever the reason, the type of waiver it was, it was a wavier [sic] obtained because the Defendant was a juvenile and the police recognized that he was a juvenile and that a waiver should be obtained before --. He is a minor and that the waiver should be obtained.

Additionally, on the question of what was said to Mr. Blake or what Mr. Blake asked prior to agreeing to take the polygraph, if you look at, I don't know if Your Honor has a copy of the transcript, on page 63 of the transcript, when Detective Johns was asked this question, he says, "I don't know."

THE COURT: The transcript of the hearing we just **[120]** held?

MR. RAVENELL: Of the hearing from last week, Your Honor. I have a copy for the Court. He was asked, I will give a copy to the Court. May I approach?

THE COURT: Sure.

MR. RAVENELL: The State has a copy as well. Page 63, Your Honor. On this question of whether in fact Mr. Blake asked the police whether the polygraph would help him, what their response was. Well, the State has argued to you that these

officers have made it clear that they never in fact made any comment about this helping.

That is not what you heard. In fact what you heard in this Courtroom from each one of those officers, Corporal White, Detective Johns, and from Corporal Hannon today, is that they don't recall whether any of them ever made a comment to Mr. Blake, whether this would help him by taking the polygraph.

And what Detective Johns said in response to my question on line 16 when I asked, "Do you recall telling him about if he passed this, would it help him?" He said, "I don't specifically recall saying that." "You don't specifically recall telling the man that if he passed the polygraph it would help him?" "I don't recall saying that, no." "Okay. Well, there was . . ." And I said, "There was a long pause here. Why?"

[121] If you may recall, the Detective sat there and there was this very lengthy pause. And I asked him why was it such a long pause if you in fact didn't recall it. And he says, "I'm going through my memory trying to remember if I said it. I can't remember saying that."

Your Honor, think about that when we get to this point in my argument. And you will go, we are only talking about two detectives in a room with the Defendant. Corporal Hannon and Detective Johns asking him about whether or not he wants to take a polygraph and they now, when the question is asked, "We don't recall whether it was said."

Corporal Hannon even went further today and said, "I didn't say it, but I can't say that Detective Johns did not say it." Furthermore, Corporal Hannon said I can't say the Defendant didn't ask that question.

Corporal White, when asked, "I can't recall whether he ever asked whether this would help him and what the response was." They can't recall, Judge.

Now, Your Honor, to turn to the arguments. Quite frankly the arguments should be taken in a different order than the State wants you take them. It's not a question just about involuntariness here.

The first question the Court has to deal with in deciding whether the [sic] suppress all the statements the Defendant made, is the case that points on the case that the State made **[122]** reference to, but didn't cite to you, because it's not very helpful to them, quite frankly. It's probably why you did not get the full cite. Is the Ratavosky case. And that is 296 Md. 386. Ratavosky versus State of Maryland, August 9, 1983.

Here is what we know, Your Honor. According to the Miranda form, the first one, Mr. Blake is Mirandized at 5:11 a.m. And we know that shortly after that he invoked his right to counsel. And that everyone understood that to be what he had done.

The case law is clear that once he invokes right to counsel, the State may not initiate any contact at all. Any interrogation. And Ratavosky, Your Honor, deals with a situation where in fact the State did just that.

In Ratavosky, at the time of his arrest, the police officers, Arresting Officer Terry Judith advised him of his Miranda rights. And he refused to waive his rights as well as asking specifically for an attorney. And everyone understood that he had asked for counsel.

Following his arrest, the detective officer contacted two other detectives who came in. And those two detectives then met with Mr. Ratavosky and they later did something very similar to what the police did here, they re-Mirandazied [sic] him. But it was the contact that they made with him at all.

What is very essential to understand is that the **[123]** Court bears a per se rule that once a defendant invokes his right to counsel, there can be no initiation. And there can be no doubt that the comments by Officer Reese is an initiation. And, in fact, is an interrogation.

Any statement made by a police officer that is intended to induce a response from the Defendant is interrogation. There can be no doubt that Officer Reese's comment was in fact that.

That his comment to the Defendant, "I bet you want to talk to us now, huh," was specifically intended to ask this Defendant to speak. I direct Your Honor to Drury versus State, which is, Dwayne Anthony Drury versus State of Maryland, 368 Md. 331, September Term 2001. Actually it was filed March 8, 2002.

But before I turn to Drury, Your Honor and whether Reese's statement in fact was an interrogation, I ask the Court to look at a couple of points in Ratavosky. One, the Court said the following in Ratavosky. That, "The opinions of the Supreme Court from Miranda until the present highly demonstrate that the State's argument was untenable."

Now, let's see what the State's argument was in that case. The State's argued the following, Judge.

"That there was no violation of Ratavosky's right to

counsel during the interrogation, even though the State conceded that Ratavosky after he invoked his **[124]** right to counsel did not reinitiate the contact with the police. That the police initiated the contact. The State argued that the Supreme Court did not establish a per se rule precluding police initiating an interrogation after an arrestee had expressed the desire to have counsel present."

That was their argument. The court said that was untenable and was not the law. The court said the following.

"If a defendant asks for counsel and if, however, he indicates in any manner at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning at all."

The court went further to say that,

"In Fair versus Michael C., 442 U.S. 707, 1979, the court reaffirmed and explained the per se prohibition against all interrogation after an arrestee has requested counsel. The rule in Miranda, however, was based on the court's perception that the lawyer occupies a critical position in our legal system, because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.

Because of the special ability of the lawyer to help his client preserve his Fifth Amendment rights, once the client becomes --- adversary system, the **[125]** court found that the right to have counsel present at the interrogation is indispensable for the protection of the Fifth Amendment privileges under the system

established by the Court.

Moreover, the lawyer's presence helps guard against overreaching by the police and insures that any statement actually obtained are accurately transcribed for presentation into evidence.

The court then said,

"The per se aspect of Miranda thus based on the unique role the lawyer plays and the adversary system of criminal justice. The court fashioned in Miranda a rigid rule that an accused's request for an attorney is per se invocation of his right to counsel requiring all interrogation to cease."

The court said the following, Your Honor.

> "The rules set forth in Edwards that when an arrestee expresses his desire to have counsel present all interrogation must cease unless the accused himself initiates further communication."

Any further communication must be initiated by the defendant and there can be no doubt that in this case, there was initiation of contact by the police.

And what we have here is very unique. And I will talk about it further when I get to the Drury case, is **[126]** initiation of contact with the passing of the statement of charges that tells a 17 year old that he is facing the death penalty. And we will discuss that in response to Drury.

The court said, Your Honor, further in Ratavosky in Edwards, the Supreme Court speaking,

> "We held after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place until the accused himself initiates further communication exchanges, or conversations with the police. We recently restated the requirement in Wyrick versus Fields to be that before a suspect in custody can be subjected to further interrogation after requesting an attorney, there must be a showing that the suspect, himself, initiates the dialogue with authorities."

There certainly can be no dispute that there was, that Officer Reese appearing before the Defendant's cell with Detective Johns and making comments that we find, we believe that Your Honor will find was interrogation.

In Drury, Your Honor --.

THE COURT: I can tell you right now, I feel that there was interrogation. I don't know if that is what you are about to argue.

MR. RAVENELL: Well, and I would, Your Honor. So I will --.

[127] THE COURT: That isolated fact. I think that question was an initiated contact by the police. It was a question. Even though I know the case law doesn't require it to be a question. But that was a question and it's geared right toward the idea of asking him if he wants to say something. So I don't see how it could not be interrogation.

MR. RAVENELL: Okay. And that is the point, Your Honor. And obviously, as I said, Drury, and I will not bore the Court with that. Drury was a situation where the police

approached or had a defendant in custody and presented to him some evidence and made a comment, we are going to show, we are going to have this fingerprinted. And the court found that in that situation it certainly was interrogation as well. And that was the point of Drury.

THE COURT: I think I remember that.

MR. RAVENELL: I am sorry?

THE COURT: I think I recall that case.

MR. RAVENELL: Yes. That was the cite I gave the court earlier. So, Your Honor, what we have here is a police officer coming forth and interrogating the Defendant. It doesn't even matter whether there was any intervening factors. You will find that in the Ratavosky case and many others, the police have done similar situations where they have gone back and re-Mirandaized [sic]. That does not cure in any way the immediate violation of the defendant's right to counsel.

[128] There can be nothing. Because once you have breached that right to counsel, for him to have an attorney there with him as he has requested. To interrogate him what flows is in fact suppressed.

I am certain Your Honor is familiar with Draw versus Williams, and old Supreme Court, the decent, or the Christian burial case. You know, where the police officer may not put the site [sic] in the record. The police made the comment that, you know, they wanted the body to have a decent burial. 430 U.S. 387, Supreme Court, 1976. Argued 1976.

THE COURT: Let me ask a question though. You are not saying though that the State's argument about attenuation,

change of place, change of time, all those sorts of things are completely irrelevant even under the Miranda analysis?

MR. RAVENELL: Absolutely it is irrelevant, Your Honor.

THE COURT: So you think it only goes to a due process voluntariness argument?

MR. RAVENELL: No. I think that there are two things. One is that we will have second arguments. I am saying that in the first light once, if the Court finds that this was in fact a violation of his right to counsel, everything that flows from that. Every one of the statements. Intervening or not.

THE COURT: Well, I guess the whole attenuation **[129]** argument goes to. Is what flows to it. Because let's take a ridiculous example. Those things happened that we just described. That statement is made. I think it is an interrogation. And for whatever reason six months later he is still in lockup. And all of a sudden he says --.

MR. RAVENELL: Clearly not. Clearly not. What the Court has to consider here is whether the impact or the comment had any impact on the Defendant to speak to the police. And what the State's problem with this is that they are saying that they can tell you that in his mind the only thing that caused him to speak to the police later on was him reading the statement of charges.

And I am telling you that the facts that have come into this Court, they have not come close. And their burden to show you that the only thing that caused Leeander Blake to speak to the police was him seeing the statement of charges and reading what Terrence Tolbert had said later.

They have to show you that that is all it is. That that intervening fact alone was what caused him to speak. Because if it was a combination of all those things, it was a combination, for example, of Officer Reese's statement and him reading the statement of charges, they can't show you that the initial violation has been cured.

THE COURT: Well, let me ask you another question. I haven't had the advantage of having a transcript. But when I **[130]** was reading my notes over, I didn't have in my notes that any of the police officers testified that Mr. Blake read the statement of charges. I had that, well, Mr. Blake testified, that is a different story.

But in the police officers' testimony, perhaps if you read the whole transcript you can tell me. Is there something in there that says he actually read it. I know that he received it. He looked at it.

MR. RAVENELL: No. Not at all. In fact, what the Detective said in response in the transcript, in response to questions from Ms. Alban is that the Defendant had not had time to read it at the cell. Read the full transcript. But never that when they came back at 6:28 and he said he wanted to speak, for example, anyone never asked him, did you read the transcript. That was never ---.

THE COURT: Well, I don't have that in my notes.

MR. RAVENELL: I am sorry.

THE COURT: I don't have that in my notes.

MR. RAVENELL: No. I am saying they don't have it. I am saying there is nothing. It is silent. That there was

ever given a question of him, have you read this. Or did they read it to him. All they have at the time is that it was presented to him. And that he had it for about 28 minutes.

There is nothing in the record from the State's case that he had read it and digested it and therefore it had an **[131]** impact. Now the questions were asked of Mr. Blake, yes, today, that he had read it. And he said he had read it.

But, no, in response to Your Honor's question, there was nothing presented in the State's case that Mr. Blake had read that statement of charges and digested it before speaking to the police. What they have is that it had been given to him and that is all they have.

Your Honor, the other aspect is that, as I said, you look at Ratavosky, the re-Mirandaizing [sic] does not cure it. The only thing that could cure it if the Court were to find, I believe, and I don't think the Court has evidence to support this, that the only thing that caused Mr. Blake to speak to those police officers later was the fact that Mr. Blake had read, digested, the statement of charges. And then concluded that because of this I am going to speak.

In fact, that question wasn't asked of Mr. Blake by the Prosecution today whether that is why he made the statement. In fact, what was asked is did you want them to know these things. And he said yes. Certainly once he spoke to them he wanted them to know these things, as he said.

But not once was he asked or did he say that the reason I spoke to the police is because I had read that statement of charges, saw what Terrence Tolbert had said, and now that is the reason why I gave the police --.

In fact, he said on direct examination that the **[132]** things that were most prominent in his mind was the fact that Officer Reese had made these, as he termed it, threats or comments towards him that he was scared after Officer Reese made those comments. And that he was given a statement of charges showing that he faced the death penalty.

The State asked you to look at Connover, Your Honor, and White. And here is how this case is easily distinguishable from Connover. If you look in the Drury case that I mentioned to you, the court actually discussed Connover in the Court of Appeals decision in Drury. And the court said,

> "In Connover the defendant was arrested and invoked his Miranda rights. The police in compliance with Maryland Rule read and gave him a copy of the statement of charges."

Now, here is what is interesting. You have heard no testimony here today or last week, that it was routine booking procedure for the police to give Mr. Blake his statement of charges. You haven't heard that. And in that case there was actually testimony that this is what the rule is and that is why they gave him the statement of charges.

All you have heard today and last week was it was done. No evidence introduced in this hearing that it was a routine booking procedure. If I may continue.

> "And they gave him the statement of charges including the application for the statement of **[133]** charges suggesting that he read them and ask any questions that he had."

That wasn't done here. "Connover then made a self

incriminating statement. Following our early decisions in Vines . . ." And Vines, the cite is 285 Md. 369, 1979. The court said, "The routine processing of an arrested defendant does not amount to interrogation under Miranda. We found no . . ." This is interesting. ". . . we found no sinister motive in the fact that the police provided Connover with a copy of the application as well as a copy of the statement of charges."

Well, we know that, those facts are very different here, Your Honor. Because in this case, number one, you have provided the Defendant a copy of the statement of charges that he faced the death penalty, when he in fact did not.

And, how this case is so markedly different than Connover is that in addition to passing the statement of charges you now have Officer Reese stepping up to the plate making the comment. And no one in their right mind would suggest that Officer Reese's comments were any way part of routine booking procedures.

So this case is markedly different than the Connover case where the court said in that case where there was evidence in the record that this was routine booking procedure and simply giving the Defendant the statement of charges and saying if you have questions, you can ask. Quite different than these **[134]** facts where you give it to him and make a comment, "I bet you want to talk now, huh!" This case falls outside of that, Your Honor.

Your Honor, we also have in this case, interestingly enough, when it comes to the credibility, you had a chance to listen to Leeander Blake testify and to listen to Officer Reese and Detective Johns.

We also had a chance to hear very briefly from Agent

Costello who told you that Mr. Blake is a very honest young man, very respectful. And you actually saw that in the way he testified today. You know, he was very respectful in his responses to the Prosecution as well as to the Defense. I mean, that is who he is.

And the Court got a chance to see that and hear from him as well as have testimony from another State's witness about who this young man has been in the past as well. Very respectful of authority.

So it's not shocking that when the police start telling him that he should do something that he is going to do it. Not shocking that when you have Officer Reese yelling at him, whether Officer Johns made the comment to him that he says he wants counsel. That doesn't change the impact of what that had in his mind, as Your Honor knows, for the subjective issue of whether the Court can find from this record that subjectively he felt that i [sic] was in his best interest or that he **[135]** was coerced.

And that is the other aspect of this, Your Honor. That what we have is Officer Reese's statement amounts to coercion. No one can suggest, I would think, that this was not a coercive statement or that it was not designed to be coercive.

And we know that the argument they would have is that, the State would have that has been cured by Detective Johns' actions. But the Defendant has testified, I believe credibly, that that comment continued to weigh on him while he sat there. And he continued to be afraid because of that comment. And it did impact him and caused him to step back before the police and give a statement, Your Honor.

I direct Your Honor to a couple of cases. Winder

versus State, 362 Md. 275, actually a 2001 decision by the Court of Appeals. Where the court said the following, Your Honor.

THE COURT: W-i-n-d-e-r.

MR. RAVENELL: W-i-n-d-e-r. The court said,

> "When the voluntariness of a confession is challenged properly, the State carries the burden of showing affirmatively that the exculpatory statement was free and voluntary and freely and voluntarily made, and thus was the product of neither a promise or a threat."

[136] And we have both here. And I will explain why. The court said further, Your Honor that,

> "We glean a two part test to determine the voluntariness of a custodian confession based on Hilliard in circumstances where the defendant alleges that the police induced his or her confession by making improper promises.
>
> We would deem a confession to be involuntary and therefore inadmissible if a police officer or an agent of the police force promises or implies to a suspect, even implies to a suspect, that he or she will be given special consideration from a prosecuting authority or some other form of assistance exchanged for the suspect's confession. And the suspect makes the confession in an apparent reliance on the police officer's statement."

Regarding the issue, Your Honor, of --.

THE COURT: Do you have a page cite for that?

MR. RAVENELL: Your Honor, I actually have the Lexis printout so it would not be the same page number. The court says further,

> "In prior cases we have held that the following statements constituted improper inducement. 'Produce the narcotics and your wife would not be arrested.' Stilks, 289 Md. 157. 'If you are **[137]** telling me the truth, I will go to bat for you.' Hilliard, 286 Md. 153. 'It would be better for you if you made a statement because if you did they would try to get him on probation.'"

And that is Streams versus State, 238 Md. 278, Your Honor. And here is the case that I think that has the most impact on the comments made to Mr. Blake. "It will help you a lot." Labinsky versus State, 180 Md. page one, 1941. And "It would be better to tell the truth and have no more trouble about it." Bisco versus State, 67 Md. page six, going back to 1887, Your Honor.

The common thread in each of these cases is that a singular statement, as I am reading from the case law, a singular statement communicated to the suspect may be sufficient to qualify as an inappropriate offer of help held out to the suspect.

And the singular statement, we have two here. One singular statement regarding coercion. One singular statement regarding inducement. Where the Defendant is told, is basically threatened by an officer that, you know, he basically better talk because he is now facing the death penalty, as Officer Reese did.

And then the comments where the Defendant is told twice that if he in fact takes the polygraph and gives further statements that in fact will help him. He asked, would it help **[138]** me. The answer he was given on two occasions is, it will help you. And there actually is no direct testimony in this Courtroom refuting his testimony. It's just been three officers saying we don't recall whether he asked that. And we don't recall whether we said to him it would help.

On the issue, Your Honor, of the coercive barnacles, in the Winder case, the police said the following to the Defendant.

> "The community is in an uproar. You know, they think they have got a person out there who killed these people and set their houses on fire. You think we are the only ones right now that are looking for you? Why do you think we wanted so much to look for you tonight?"

The police said the following, "You tell the defendant about the alleged rumors of revenge that we received information the word on the street was some people might want to get Eugene." Referring to the defendant, who was Eugene Winder.

> "It doesn't take much in the issue of threats and coercive comments by police officers. If, and in fact, it has the desired impact on the defendant, which is to make the defendant believe that there is someone suggesting to him that it is better for you to do this for whatever reason. It is better **[139]** for you to speak to the police."

Additionally, Your Honor, on the last issue is the Miranda waiver without a parent being present, in violation of

the Fifth Amendment. We know that the Defendant had been arrested twice previously. And each time he was released to his mother.

There is no Miranda warnings previously given to the Defendant. He has testified to that and the police had no information that he had been Mirandaized [sic] previously. We know that his mother was available. The police had gone to her home. She is about three miles away, a few minutes away.

The police knew that she was only a few minutes away. And, in fact, when they wanted her to sign a waiver for the polygraph they had no problem getting her to come to the barracks, which as they indicated, officers testified, was at least another half a mile further away from the Defendant's home than the police station. Yet they did not bring the Defendant's mother to the police station.

I direct Your Honor to Jones versus State, 535 A.2d 471, 1988 case from the Court of Appeals.

THE COURT: I am sorry. 535 A.2d what?

MR. RAVENELL: I am sorry. Let me give you the --

THE COURT: Do you have the Maryland cite?

MR. RAVENELL: -- Maryland cite, I will give you that. 311 Md. 398. I am sorry. 1988. And the court said the **[140]** following, Your Honor, that,

> "Absence of a parent or guardian at a juvenile's interrogation is important. It is an important factor to determine voluntariness of the confession of the lack of access of a parent prior to interrogation does not automatically make the juvenile's statement inadmissible."

The court said,

> "We recognize, of course, that great care must be taken to assure that statements made to the police by juveniles are voluntary before being permitted in evidence."

And in this case, Your Honor, we have this twist where the police officers before taking a statement now know that Officer Reese has threatened the Defendant, made this comment before him that they are all concerned about.

One of the things the court said in the Jones case, because they are the court that found that the statement should come in. But in footnote five, the court said the following,

> "The trial judge specifically considered Jones' youth and intelligence and also whether the police had banged on Jones during the interrogation."

And there the court found there was nothing the police did that was coercive regarding the juvenile when getting that statement from him without his parents being **[141]** present.

But we know that not to be true here. We know that this officer's comment was so egregious that the police officers, if you accept their word, they went to supervisors to tell what had happened. I don't understand why they didn't tell Officer Reese's supervisor, who was right there. But that they were very concerned about this egregious conduct.

In fact, we have Detective Johns say that he was so

concerned that that action by Reese was in fact violative of the Defendant's right to counsel and that is why he took the actions he took with Officer Reese.

We also know, Your Honor, that when we talk about the police actions here, we also can consider the coercive atmosphere when he was arrested. Now certainly the police can go in and arrest someone at gun point who was charged with murder. We don't suggest otherwise.

But we know that the police went into this house, you know, kind of gestapo type, you know, guns drawn, guns in everyone's face, dragging the Defendant out in his underwear, rainy out, stepping in puddles of water.

And then holds him for at least an hour and a half, by Detective Johns' statement, because if you recall the Defendant was arrested around 5:00 o'clock and he receives his clothes at 6:28 under Detective Johns' version.

At least an hour and 20 minutes that he is being **[142]** held in this, as in Detective Johns' terms, chilly or cold cell. And that he was so concerned that he wanted to get the clothes to him.

But if we look at the way he was arrested, Your Honor, the Supreme Court recently in a case called Robert Kaupp, K-a-u-p-p, versus Texas, actually just decided May 5, 2003, so I only have the Lexis cite.

On January 26th, the police officers went to Mr. Kaupp's home and two officers handcuffed Kaupp and led him shoeless, and dressed only in boxer shorts and a t-shirt. When I read this, I said, boy, sounds very much like this case.

THE COURT: Was he a juvenile?

MR. RAVENELL: Yes, Your Honor.

THE COURT: Kaupp is a juvenile?

MR. RAVENELL: I am sorry, let me just check. Yes, 17 year old. 17years old. And they dragged him out shoeless, dressed only in boxer shorts and a t-shirt out of his house and into a patrol car.

And the court found that in that case, that case comes on some different facts, which is whether he was in fact in custody. But the court commented about the actions of the police and that is why I draw the Court to those same facts.

What we are talking about, Your Honor, is how those, when you look at all the factors that he is there taken out, the way he was taken out by the police and held without **[143]** clothes. The statement by Officer Reese. Whether those factors, when you consider the Defendant is now going to be questioned by the police, whether the police should have in a situation as this brought the Defendant's mother present and had her present before they questioned him.

Because as the Court of Appeals has said in Jones, it certainly is an important factor for the Court to consider. The court has made it clear, and I don't suggest otherwise, that there is a absolute requirement for a parent to be present.

But it is a factor the court should consider, in looking at each case individually, obviously, the facts of each case, whether it would have been appropriate. And I say, Your Honor, that in a case where they found time to bring her to the barracks to have the mother sign a waiver for a polygraph, they

could have had her for that same waiver for Miranda as well.

And what is interesting is that she was present according to the police in the barracks when they did the last Miranda warnings by Corporal White. And yet they still did not bring her in. But did give her the form to sign for the waiver regarding the polygraph.

THE COURT: Now, you are still talking about in the Annapolis police department. Right?

MR. RAVENELL: Your Honor, actually at this time -- yes. I am saying she should have been brought to the **[144]** Annapolis --.

THE COURT: When you said second.

MR. RAVENELL: Well, let make sure that I am clear. The third advice of rights, I believe, occurred at the --

THE COURT: State.

MR. RAVENELL: State police. And the mother was present. What I am suggesting is that she should have been brought to the police station when the second advice of rights was given to the Defendant after they had the actions with Officer Reese that was not usual to say the least, Your Honor.

Your Honor, I will be happy to answer any questions the Court has on any of the issues.

THE COURT: Well there is only one area that I would appreciate if you would address. First of all, I have one question. What court did you say K-a-u-p-p is?

MR. RAVENELL: The Supreme Court, Your Honor.

THE COURT: Okay. Supreme Court. And what about even if one statement is not admissible? The admissibility stands for the second statement.

MR. RAVENELL: Your Honor, I believe it is clear that any statement, once there is a violation of the Defendant's right to counsel, they can re-Mirandaize all they want. That does not make --.

THE COURT: Yes. But what about my ridiculous example? We know that probably if six months go by and **[145]** somebody walks up to him and re-Mirandaizes [sic] him, don't ask me why this would happen, but if it did, are you saying still because those things that happened six months prior, there is never going to be a scenario where he can make a statement?

MR. RAVENELL: As long as it the same case and the Defendant has in fact requested counsel. In fact there was a case just decided by the Supreme Court last year, Texas versus Cobb, where the court, I believe it was denied. Where the court found that in that case it was okay because the defendant, the charges in the state court were dismissed.

The defendant was then recharged in Federal court. And the court said that the request of counsel didn't carry over to Federal court because it was a new jurisdiction. And the defendant was being charged in a new jurisdiction and, in fact, that, for example, the gun charge, I think it actually was a murder charge there, had some different elements in Federal court versus state court.

But made it clear that, yes, if they were the same

charges, as long as these charges are still out there alive and defendant has requested counsel, never can the police re-interview him by simply saying we are going to give you Miranda, ever.

THE COURT: So your reading of the case law is that under a strict Miranda analysis, there is no point even looking into attenuation. It's irrelevant.

[146] MR. RAVENELL: Exactly, Your Honor. It is irrelevant once, and it is not Miranda. Be careful. It is the defendant's not just Miranda, his Sixth Amendment right to counsel and Fifth Amendment right once he invokes that. The right to counsel.

Because that right to counsel, as I read from the case, is that right to counsel is so unique to our adversary system that once a defendant says I want counsel, and often what some view in our system as confused the right to remain silent with the right to counsel.

THE COURT: No, I understand that distinction very clearly.

MR. RAVENELL: Right. What we have, Your Honor, is that even if the Court were to consider, and I think would be, I would disagree with the Court, that the attenuation is an issue. If the Court were to consider the attenuation issue, the Court would have to consider the attenuation issue, the Court would have to consider, I think, find that the only issue, the only reason why the Defendant then went forth and gave a statement is the Government's argument that once he read the statement of charges and saw that his co-defendant had made a statement that that is the only thing that led him, caused him, to make a statement further.

And what we do have, Your Honor, going forth as well, on his later statement, is also the issue of inducement **[147]** regarding the police officer's comments that it would, in fact, help the Defendant regarding the polygraph. So, that is still there as well.

It is a situation, Your Honor, where this is very similar to, you know, the fruit of the poisonous tree. When --.

THE COURT: Right. When you look at attenuation of the fruit of the poisonous tree. That is why I keep asking you the same question over and over again. You seem o [sic] be saying once there is that violation, after he invokes his right to counsel, it is irrelevant whether there is attenuation.

MR. RAVENELL: And this why it is different. And that is what I am saying. It is very similar to it. It is similar because in that situation, talking about a Fourth Amendment violation, where the Defendant, where this Court finds based on, for example, a search issue. Whether there is new information the police gather, for example, that is not relevant or not related to their first violation.

Here we are talking about a Sixth Amendment right to counsel where the Defendant has invoked that right to counsel and between that nothing should happen where the police initiate any effort to have the Defendant waive that right. There is no attenuation that I have ever seen in a Sixth Amendment issue.

As I said in the case, and I believe if you look at **[148]** Cobb, I believe it's Texas versus Cobb. I will be happy to get the correct cite if it isn't. That what you are talking about is the court makes it clear that only in a situation where the Defendant is now being charged with a different crime, does that right to

counsel as a change.

In fact, I had a hearing before Judge Andre Davis in Baltimore City, excuse me, in Federal Court last year on the same issues. And Judge Davis had some problems with Cobb, but he also found that my case was where my client was in Baltimore City Circuit Court charged with a firearm, felony possession.

The police came in, arrested him on the day of trial, took him to Federal court and on the way over to Federal court, because they now had an indictment there, interviewed him. And the court suppressed that statement because His Honor found that the defendant had invoked his right to counsel and that right to counsel did not change because the crime in that case was still the same crime.

But all the case law, and I will be happy to get it, was clear that there is no we [sic] get to talk to him again because we have this per se rule. There is no we [sic] get to talk to him again if six months have passed, unless he waives his right to counsel.

THE COURT: Well, by way of brief comment in case this should make me learn something that I should. It just strikes me that if you look at it exactly the way you have **[149]** indicated the case law reads, it would be irrelevant then to the whole analysis if the Defendant, in actuality, changes his mind.

Now let's just pretend that we know that as a fact. In this case we don't know that as a fact. Okay. Let's say it's a given for the purposes of what I am saying, that the Defendant actually changes his mind and the changing of his mind is voluntary. For whatever reasons of his own, he decides I really would feel a whole lot better if I told them everything. I want

to tell them everything.

Now, if you are correct, it makes no difference whatsoever, because once he has invoked his right to counsel and there is an intervening statement by Reese, even if it's completely voluntary that he changes his mind and wants to talk, it doesn't make any difference.

MR. RAVENELL: And I think you are right, Judge. And that is why the courts have made it clear that the defendant must be the one to reinitiate. Otherwise reinitiation would mean nothing.

The Defendant, if he changes his mind and reinitiates, then that is the only way the State can say that there is a basis now. That is why the State's argument here is that the Defendant not only changed his mind. They are saying he also reinitiated.

THE COURT: Right. But then let's go back one more **[150]** time if I could, to my ridiculous example. Six months go by. Everything transpires just as it has occurred in this case. Reese makes that statement. Okay. But, instead six months goes by and then the Defendant says, okay, I think I changed my mind. I want to talk to you now.

MR. RAVENELL: Well, that is different. I said the question is who in fact reinitiates. The police can't reinitiate the conversation. Here the police, in fact, did reinitiate. If the Court finds that the police reinitiated the contact here, not the Defendant.

If the Court were to find the Defendant somehow reinitiated the contact and that, for example, that Reese's comments was not a reinitiation, then I think we are in a

different ball game. If the Court found that that was. But, if I have heard Your Honor, you found that that was interrogation.

THE COURT: It is absolutely interrogation.

MR. RAVENELL: Right.

THE COURT: But I am saying there is no end to it under your analysis. It could go on for three years and the Defendant might, because his grandmother died, decide that he wants to tell the whole story. Right.

MR. RAVENELL: Right.

THE COURT: And still it would make no difference because three years ago an officer reinitiated contact after he **[151]** invoked his right to counsel. And I am saying if you are right and the case law permits nothing about attenuation, then you have these ridiculous situations where no one can every [sic] confess to a crime if a police officer has initiated.

MR. RAVENELL: No. And I understand what you are saying, Your Honor. I don't think it is so far fetched. I think you do look at the time period. Obviously if it's six months to a year later, that is one thing.

Now, what I will tell you, though, is that in the case law that I have read, the court has suggested that when the defendant asks for counsel and the defendant has asked for counsel in the same case, that the police do not simply cure it by reinitiating Miranda.

If the defendant on his own were to come back and say I want to speak, I think that is different. I think we are clear on that. If he, himself, says I wish to speak to you after that and it

is clear that the defendant speaks to the police on his own because of no interaction by the police, then that is one thing.

That is why I said the Court has to look at the reasons why. And it is the State's burden to show that if there is an attenuation issue, that the only reason he came back to speak to the police was because the Defendant's looking at the statement of charges and seeing what is there and saying, now, I have decided to speak. And I don't think that **[152]** is what we have here.

THE COURT: Right. So now you can see what I said all along. That attenuation is not irrelevant to the analysis.

MR. RAVENELL: Right. I agree that it is not irrelevant.

THE COURT: Okay. I feel much better.

MR. RAVENELL: I am happy I could make you feel better.

THE COURT: Is there anything else you wanted to say, sir?

MR. RAVENELL: Nothing else at this time.

THE COURT: Okay. Thank you.

MR. RAVENELL: Thank you, Judge.

THE COURT: All right. State, would you like to be heard again?

MS. ALBAN: Just briefly, Your Honor. A few

comments that Defense made about the testimony. I think it was clear that the testimony was that there was no preconceived plan with Reese. I am not going to defend Reese's statement in any way. But that it wasn't a diabolical, it wasn't a plan to get the Defendant's will overborne to reinitiate all of this contact.

There is no obligation on the police to ask why he changed his mind. The Court can make that determination from the facts that are surrounding it. What the obligation -- and **[153]** even the courts have went so far as to say that there is no even obligation to clarify the reinitiation. But, suggested that it would be good for the police to ask following clarifying questions if here is an ambiguous assertion or reinitiation.

They didn't even obligate that they do that, let alone find out the reason why there would be something like that. Basically, they clarified to make sure he was sure he wanted to do this.

Now our burden in this is not to show that the statement of charges was the only reason or that that didn't have any, that Reese's comment didn't have any impact. My burden is to show that the Defendant's will was not overborne by Officer Reese's comment to the extent that his confession was then involuntary. And I would submit to you on the facts that we have already done that.

In Ratavosky, the case the Defense cites, I think it's distinguishable from this case in that the police at that point reinitiated contact with the defendant. They wanted to start a generalized discussion about the crimes that were going on. And that court made a distinction between that type of behavior on the police and a request for, do you want water. Or do you need a telephone.

They said that if you are offering those types of things that that does not amount to reinitiation. It dominated [sic]**[154]** between that. And I would argue to you that by Detective Johns going back to give the clothes, it does not amount to a reinitiation at that point.

THE COURT: Well, what about the previous statement though? You would concede that is a reinitiation.

MS. ALBAN: I would say that it was a coercive statement by Officer Reese, yes.

THE COURT: And it's a -- isn't it a reinitiation? How do we get around that? Because I mean out of the blue Officer Reese makes that comment. And it's about talking to the police.

MS. ALBAN: I would argue that there was attenuation from what Officer Reese said. I wouldn't say that it amounted to interrogation because of Detective Johns' immediate response. You have to look at the entire circumstances surrounding that.

He immediately said, he doesn't want to talk to us. We can't talk to him. He immediately tries to quell any influence that that would have had. He says he does it so he can't hear anything that the Defendant would say.

I think that the Court gets to consider all of that in addition to the fact that Reese has been absent and that it is Johns that is just giving him the clothes and that it is at that point the Defendant who is initiating the contact.

Now, what Mr. Ravenell, I think he finally said that **[155]** Miranda later on there can be some attenuation that

occurs. What I would argue is that a lot of the case law has been saying that Miranda isn't curing it is because the Miranda is given contemporaneously with the initiation by the police.

And that is not what you have here. You have a comment by Reese that doesn't result in a statement or any comments or any interrogation. It's a half an hour later after the Defendant has had an opportunity to review the statement of charges.

And we know that he did by his own testimony. That he said, yes, I saw all the details at that point. And yes I became aware that he was, what he was being charged with.

THE COURT: Okay. Now do we have that in evidence. Again, I am going to ask you. Because I don't have it in my notes. I don't have yes, I became aware of all the details.

All I have from the Defendant's own mouth is that he saw that it was a death penalty case. And I don't have anything in my notes, and of course I haven't read this transcript yet.

MS. ALBAN: Well, and it wasn't from the transcript. It was from today. That when I asked him, I said --

THE COURT: When you asked who?

MS. ALBAN: The Defendant about it. Did you read that Tolbert had told the police this. That Tolbert had told the police that you had the --.

[156] THE COURT: No, that you were the shooter.

MS. ALBAN: That you were the shooter. That you

pulled the trigger. That you were the one who got the keys. And he said, yes, yes, yes. So he became informed of each and every one of those facts before he went back to the police.

And at that time I asked him, I followed it up, but those weren't the facts were they. And that this has made you angry and that this is why you wanted to talk. And you know that it was important for him to get the statement out.

So I would argue that yes, we have it in evidence that he reviewed that and became aware of the facts that were presented to him. And then I think that the Court can look at his behavior afterwards and it is explained.

In Connover, it was talking about, yes, it was routine police practice, but it was routine police practice in that it was important to the Maryland Rules which governed the entire State, that they must serve him with the arrest warrant in a prompt fashion. And I would argue that here --.

THE COURT: In a prompt fashion, is that what you said?

MS. ALBAN: I have the case. "The charging document shall be served on the defendant promptly after it is filed and a return shall be made as a warrant." And then I would argue that Defense counsel wants to make an issue about the Defendant's mother not being present. The testimony was that **[157]** the Defendant never even asked for his mother to be present.

And the police are under no obligation to bring his mother down without him even asking for it. Even when he asked for it, it's not necessary. It's just a factor that the Court gets to look at. And in fact the Court even distinguished it

from the right to an attorney or something along those lines. So that that would not necessarily have violated his rights at that point.

And, basically, our position is if you take a look at the totality of the circumstances, that it was in fact a voluntary statement. That the Defendant was the one who reinitiated contact with the police. And that at that point we had valid waivers. And then the attenuation down the line. And I think that is all.

THE COURT: Okay. Would you be able to provide me with a copy of the Connover and the White cases?

MS. ALBAN: I have, yes. I actually have them right here.

THE COURT: Okay. Are we finished?

MR. RAVENELL: Your Honor, if I can be just heard briefly, if the Court will. Your Honor, the two things and I have said this before, and I think that the State still confuses two things, which is this voluntariness issue versus a Defendant's right to counsel he has asked for.

The will being overborne is not the standard the **[158]** Court looks at when they are deciding whether in fact this is a violation of the Defendant's right to counsel. That is a standard that deals only with the issue of voluntariness.

And what we have here, Your Honor, while there is certainly an issue of voluntariness here, as we have argued, when the Court looks at the Defendant requesting counsel and then the Court looks at what occurred after he requested counsel.

What we do know is the Defendant is given a statement of charges that says he faced the death penalty. We do know that Officer Reese has made the statements to the Defendant, which he tells you has impacted him in making this decision. And we also know that yes, he has read the statement of charges regarding what Tolbert has said.

The Court must look at in this case whether this violation of the Defendant's right to counsel, where Officer Reese in fact did do that, when he did in fact interrogate him, whether it had an impact on the Defendant giving up his right to counsel and speaking to the police.

And, what we have here in this entire matter from the time the Defendant started to speak to the police is around 6:28 until he speaks to the police again at the barracks at 9:00 o'clock. There is no long time period. We are talking about just a couple of hours at best.

This is not the kind of attenuation that Your Honor **[159]** has talked about where you have weeks or months where the Defendant really has the time to sit back and even talk to counsel. And comes back and says, you know, I want to speak to the police now. That is quite different.

We are talking about a 17 year old, impressed young man, who comes in and says, with respect for authority, who know [sic] is given this information regarding the death penalty, which he in fact didn't even face legally, and the fact that we have not had in this record any testimony that this was a routine procedure.

That the commissioner is the one who normally gives him the statement of charges versus the police officers. You don't have that here. You can't rely on just the fact that in

Connover where the court says that in those cases where you have that information where it is the police, where the police in fact has given a statement of charges, and that it is common practice to do that.

You can't ignore the facts here where it is a given of that statement of charges with the comment by Officer Reese. And that is this case, if you look at Connover and you look at White, none of those cases will be like that where the officer makes these types of coercive comments at the time one is given that statement of charges.

And we are talking about a short window of opportunity here. A short time period from 6:30 to 9:00 **[160]** o'clock when these statements all occur, Your Honor. Thank you.

THE COURT: Thank you. Are there any cases that you have cited that you have available to you right now that you could provide me with?

MR. RAVENELL: Your Honor, yes, we have copies. I think, of all the cases.

THE COURT: One other thing. In all likelihood I want to give this opinion orally. And I know Mr. Ravenell you are not available. Is Mr. Bates available to come for me to recite this at some point? Monday or Tuesday?

MR. RAVENELL: Your Honor, we will, yes, one of us will be available.

THE COURT: Because we start on Wednesday, don't we? Okay. Wednesday is the first trial date, the beginning trial?

MR. RAVENELL: Yes, Your Honor.

THE COURT: Okay.

MR. RAVENELL: We will provide you with copies of all the cases we have cited, Your Honor.

THE COURT: Thank you. All right. You are excused.

MS. ALBAN: Is the Court going to contact us when you will be --.

THE COURT: Yes. I will. It will probably be Tuesday morning. If I can do it Monday afternoon, I will let you know.

[161] MS. ALBAN: Okay.

THE COURT: But I don't think so, because I have drug court all day. You are all --.

MS. ALBAN: Your Honor, I have an outline that I compiled with all the case cites that I reviewed for this. I don't know if the Court would be inclined, but here is an extra copy. I can give you a full --.

THE COURT: Okay. Sure.

MR. RAVENELL: Your Honor, the only case I don't want to provide, we have a lot of markings in the Drury case, so it would be not fair to the State to give you a copy.

MS. ALBAN: I actually have --.

MR. RAVENELL: It has written notes, and I prefer not to do that. It wouldn't be fair.

MS. ALBAN: Your Honor, here is the outline that I prepared. The case cites are contained there as well.

THE COURT: Thank you.

MR. PAONE: We have a copy of the Drury case, Your Honor, which we will be happy to provide to the Court.

THE COURT: Thank you.

(Whereupon, the hearing was recessed to reconvene at 9:00 o'clock a.m., June 3, 2003.)

DISTRICT COURT OF MARYLAND FOR
Anne Arundel County
Located at 251 Rowe Boulevard, Annapolis, Maryland 21401

Case No.: 002A00113885

STATE OF MARYLAND VS BLAKE, LEEANDER JEROME

COMPLAINANT: 1376 TYLER AVE
Officer: JOHNS, WILLIAM L ANNAPOLIS, MD 21403
Agency/Subagency: AB 0001 CC#: SID:
ID: 1603 Local ID:
DL#:B420497402412
DL State:MD
Race: 1 Sex: M
Height: 5'8"
Weight: 150 Hair: BLK
Eyes: BRN
DOB: 06/01/1985
Phone(H):
Phone(W):

STATEMENT OF CHARGES

UPON THE FACTS CONTAINED IN THE APPLICATION OF JOHNS, WILLIAM L
IT IS FORMALLY CHARGED THAT BLAKE, LEEANDER JEROME at the dates, times and locations specified below:

NUM	CHG/CIT	STATUTE	PENALTY	DESCRIPTION OF THE CHARGE
001	2 0900	27 407	DEATH	MURDER-FIRST DEGREE On or About

				09/19/2002 at 7:32PM 1 CUMBERLAND COURT ANNAPOLIS ANNE ARUNDEL COUNTY MARYLAND ... did feloniously, willfully and of deliberately premeditated malice aforethought kill and murder Sraughan Lee Griffin. Against the Peace, Government, and Dignity of the State.
002	1 0999	27 411	30 Y	MURDER- SECOND DEGREE On or About 09/19/2002 at 7:32PM 1 CUMBERLAND COURT ANNAPOLIS ANNE ARUNDEL COUNTY MARYLAND ... did feloniously and with malice aforethought, kill

				and murder Straughan Lee Griffin. Against the Peace, Government, and Dignity of the State.
003	2 0705	27 487	20 Y	ARMED ROBBERY On or About 09/19/2002 at 7:32PM 1 CUMBERLAND COURT ANNAPOLIS ANNE ARUNDEL COUNTY MARYLAND ... did unlawfully and feloniously, with a dangerous and deadly weapon, rob Straughan Lee Griffin and violently did steal from said person car keys and a 2000Jeep Gran Cherokee automobile. Against the Peace, Government, and Dignity of the State.

004	1 0826	27 348A	30 Y	ARMED CARJACKING On or About 09/19/2002 at 7:32PM 1 CUMBERLAND COURT ANNAPOLIS ANNE ARUNDEL COUNTY MARYLAND ... did obtain unauthorized possession and control of a motor vehicle, to wit: 2000 JEEP GRAND CHEROKEE from STRAUGHAN LEE GRIFFIN who was then and there in actual possession of the motor vehicle by force, violence, and employing and displaying a dangerous and deadly weapon. Against the Peace, Government, and Dignity of the State.

Date: 10/26/2002 Time: 02:46 AM Judicial Officer: /s/ 7003

Tracking No. 021001825983

DISTRICT COURT OF MARYLAND FOR
Anne Arundel County
Located at 251 Rowe Boulevard, Annapolis, Maryland 21401

Case No.: 002A00113885

STATE OF MARYLAND VS BLAKE, LEEANDER JEROME

COMPLAINANT:
Officer: JOHNS, WILLIAM L

Agency/Subagency: AB 0001
ID: 1603

1376 TYLER AVE
ANNAPOLIS, MD 21403
CC#: SID:
Local ID:
DL#:B420497402412
DL State:MD
Race: 1 Sex: M
Height: 5'8"
Weight: 150 Hair: BLK
Eyes: BRN
DOB: 06/01/1985
Phone(H):
Phone(W):

STATEMENT OF CHARGES

UPON THE FACTS CONTAINED IN THE APPLICATION OF JOHNS, WILLIAM L
IT IS FORMALLY CHARGED THAT BLAKE, LEEANDER JEROME at the dates, times and locations specified below:

NUM	CHG/CIT	STATUTE	PENALTY	DESCRIPTION OF THE CHARGE
005	1 5299	27 36B(d)	20 Y	HGV USE/FEL-VIOL CRIME On or About 09/19/2002 at

7:32PM
1 CUMBERLAND COURT
ANNAPOLIS
ANNE ARUNDEL COUNTY
MARYLAND
... did use a handgun crime of violence. Against the Peace, Government, and Dignity of the State.

Date: 10/26/2002 Time: 02:46 AM Judicial Officer: /s/ 7003

Tracking No. 021001825983

DISTRICT COURT OF MARYLAND FOR Anne Arundel County (City/County)

LOCATED AT (COURT ADDRESS)

251 Rowe Blvd.
Annapolis, MD 21401

RELATED CASES:

COMPLAINANT/APPLICANT
JOHNS, William L.
Name (Print)

Address (Number and Street)

City, State, Zip Code Telephone

AB 0001 1603
Agency, Sub-Agency, and I.D.# (Officer Only)

DEFENDANT
BLAKE, Leeander Jerome
Name (Print)

1376 Tyler Avenue
Address(Number and Street)

Annapolis, MD 21403
410-269-1298
City, State, Zip Code Telephone

02-005334
CC#

DEFENDANT'S DESCRIPTION Driver's License #B-420-497-402-412 Sex M Race Black Ht. 508 Wt. 150 Hair black Eyes brown Complexion _____ Other _____ D.O.B. 06/01/1985 ID 01-0735

APPLICATION FOR STATEMENT OF CHARGES

Page 1 of 2

I, the undersigned, apply for a statement of charges and a summons or warrant which may lead to the arrest of the above named defendant because on or about September 19, 2002 at

Date

1 Cumberland Court, Annapolis, Anne Arundel County, Maryland, the above named Defendant did murder Straughan Lee Griffin. On 9/19/02 at about 1932 hours officers of the Annapolis Police Department were called to 1 Cumberland Court, Annapolis. Investigation showed that Straughan Lee Griffin had been shot in the head, his Jeep had been stolen and he had been run over by the Jeep as the suspects fled the area. During the course of the investigation Terrence Tolbert was identified as a possible suspect. On 10/25/02 Tolbert was interviewed and admitted to being one of the two people who was involved in the shooting death of Straughan Lee Griffin. Tolbert was able to provide accurate, intimate details of the event. (Concise statement of acts showing that there is probable cause to believe that a crime has been committed and that the Defendant has committed it.)

Place

(Continued on attached 1 pages) (DC/CR 1A)

I solemnly affirm under the penalties of perjury that the contents of this Application are true to the best of my knowledge, information and belief.

10/26/02
Date

/s/ 1603
Officers' Signature

I have read, or had read to me, and I understand the Notice on the Back of this form.

Date

Applicant's Signature

Subscribed and sworn to before me this 26 day of Oct, 2002

Year

Time: 2:04AM ~~Judge~~/Commissioner /s/
I.D. _____

I understand that a charging document has been issued and that I must appear for trial ☐ on _____
Date
____ at _____, ☐ when notified by the Clerk, at
Time
the Court location shown at the top of this form.

_____
Applicant's Signature

☐ I declined to issue a charging document because of lack of probable cause.

_____ _____
Date Commissioner

Witnesses' Names and Addresses:

_____
Name Number and Street/Agency /Sub-agency/I.D.
City, State, Zip

_____
Name Number and Street/Agency /Sub-agency/I.D.
City, State, Zip

_____
Name Number and Street/Agency /Sub-agency/I.D.
City, State, Zip

PC DC/CR 1 (Rev. 9/99) COURT COPY

DISTRICT COURT OF MARYLAND FOR Anne Arundel County (City/County)

LOCATED AT (COURT ADDRESS)
251 Rowe Blvd.
Annapolis, MD 21401

DEFENDANT'S NAME (LAST, FIRST, M.I.)
BLAKE, Leander Jerome

APPLICATION FOR STATEMENT OF CHARGES (CONTINUED) Page 2 of 2

Tolbert advised that he was with a subject named Jerome Blake who lives at 1376 Tyler Avenue, Annapolis. Police and Motor Vehicle records showed one Leeander Jerome Blake of that address. A photo of Blake was shown to Tolbert and he positively identified him as the person he was with on 09/19/02 and the person who shot Straughan Lee Griffin. The investigation revealed, and Tolbert confirmed, that Tolbert and Blake approached Straughan Griffin and pointed a handgun at him with the intention of robbing him. Mr. Griffin resisted and was immediately shot in the head and fell to the ground. Blake removed the keys to Mr. Griffin's 2000 Jeep Grand Cherokee from Mr. Griffin's pants pocket and both subjects entered said vehicle. Blake drove from the scene, running over Mr. Griffin in the process. Mr. Griffin later died of his injuries. The Jeep was later found in Glen Burnie. All of these events occurred in Annapolis, Anne Arundel County, Maryland.

10/26/02
Date

/s/
Applicant's Signature

PC DC/CR 1A (Rev. 8/94) COURT COPY

[Filed in the Circuit Court for Anne Arundel County, Maryland]

AFFIDAVIT

In addition to the Defendant's name and personal information, the Statement of Charges produced by the Commissioner's Office contains the following information:

Offense number
Charge or citation number
Statute
Penalty
Description of the charge.

It is standardized, uniform and consistent.

The police officer submits the Application for Statement of Charges. The officer does not compile the Statement of Charges. The Statement of Charges is completed by the Commissioner.

Once the Application for Statement of Charges is presented to the Commissioner, the information contained therein is entered into their computer system, which then generates the Statement of Charges. The penalty data is automatically generated based on the charge entered. This data will always indicate the maximum penalty for the associated charge.

In the case of Murder — First Degree, the penalty will always produce "Death" regardless of the defendant's age.

I hereby declare and affirm under the penalties of perjury that the foregoing is truthful and accurate.

/s/
Commissioner

/s/
Witness

[1] IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND, *
*
v. * Criminal Nos. K-2002-2154
* K-2002-2417
LEEANDER JEROME *
BLAKE, *
*
Defendant. *
* Annapolis, Maryland
June 3, 2003

MOTIONS HEARING

WHEREUPON, proceedings in the above-entitled matter commenced.

BEFORE: THE HONORABLE PAMELA L. NORTH,
Judge

APPEARANCES:

FOR THE STATE:

FREDERICK M. PAONE, Esq.
PAMELA ALBAN, Esq.
Office of the State's Attorney
Circuit Courthouse
7 Church Circle, Suite 200
Annapolis, Maryland 21401

[2] APPEARANCES (Continued):

FOR THE DEFENDANT:

KENNETH W. RAVENELL, Esq.
Schulman, Treem, Kamikow,
Gilden and Ravenell, P.A.
World Trade Center
401 E. Pratt Street, Suite 1800
Baltimore, Maryland 21202

IVAN JULES BATES, Esq.
724 Reservoir Road
Baltimore, Maryland 21217

[3] INDEX

	Page
General Discussion	4
Opinion by Pamela L. North, Judge	4
Comments by Frederick M. Paone, Esq. Attorney for the State	28
Ruling by Pamela L. North, Judge	29

Keynote: "---" indicates inaudible in the transcript.

[4] PROCEEDINGS

THE COURT: Good morning, everyone. You can be seated.

MR. PAONE: Good morning, Your Honor. If it please the Court, the State would call State versus Leeander Jerome Blake, K-2002-2154 and 2417. I am Fred Paone on behalf of the State.

MS. ALBAN: I am Pamela Alban.

THE COURT: Good morning.

MR. RAVENELL: Good morning, Your Honor. For the record, Ken Ravenell and Ivan Bates on behalf of Leeander Blake.

THE COURT: And for the record, Mr. Blake is present in the Courtroom. All right. We are here, of course, today for me to give you my oral opinion on the motion to suppress in both of these cases.

I am going to start with the law. Under Miranda versus Arizona, the defendant must be informed of his right to counsel and right to an attorney prior to any custodian interrogation.

The Miranda court stated,

> "If the accused indicates that he wishes to remain silent the interrogation must cease. If he requests counsel the interrogation must cease until an attorney is present. This is an important [5] distinction highlighted in many, many subsequent opinions."

That is the difference between asking for an attorney and simply saying you want to remain silent.

> "The right to have counsel present can be waived, of course, but the waiver of counsel must not only be voluntary, it must also constitute a knowing and intelligent relinquishment or abandonment of a known right. A matter which depends in each case upon the particular facts and circumstances of each case."

That is taken from Johnson versus Serbs. "The state must prove an intentional relinquishment or abandonment of a known right or privilege." Again, from Johnson versus Serbs.

"Courts indulge every reasonable presumption against waiver." Supreme Court case, Brookhart versus Janis, 384 United States 1. Also quoted in Johnson versus Serbs, and quoted in a number of a number of Maryland cases as well.

Edwards versus Arizona at 451 United States 477, is most instructive in this case. It makes two points crystal clear. In that case the Supreme Court pointed out that the state court may have, in fact, been correct when it assessed that Edwards' statement was given voluntarily.

But that the state court completely missed the mark by not focusing on whether he had made a knowing and intelligent waiver of his right to counsel. By focusing on **[6]** whether the giving of the statement was voluntary, the court stated, quote,

> "It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel once it has been invoked."

That is at page 484.

In the Edwards case, I quote,

> "Although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation. The court has strongly indicated that additional safeguards are necessary when that accused has asked for counsel.
>
> And we now hold that when an accused has invoked his right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights.
>
> We further hold that an accused such as Edwards having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has **[7]** been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Again, that is Edwards at page 484.

> "A statement made to a person in custody, which is reasonably likely to elicit an incriminating response has been repeated [sic] held to be interrogation. Whether it is in fact a question. Whether it is a statement. Or any number of acts which have been held to the functional equivalent of interrogation."

That is cited as Brewer versus Williams.

State versus Connover at 312 Md. 33, held that police

reading a statement of charges to a defendant and handing him copies did not constitute interrogation. And, therefore, did not deprive him of the Fifth Amendment right to counsel.

However, confronting a defendant in custody with physical evidence of a crime and telling him that the evidence would be processed for prints was held to be an example of the functional equivalent of interrogation.

Showing the defendant a copy of an incriminating document has been held to be the functional equivalent of interrogation.

In White versus State, the Maryland Court of Appeals held that when police officers disclosed the contents of a **[8]** charging document to a suspect in custody, after he had invoked his Miranda rights, there was no impropriety because Maryland Rule 4-212 required them to serve the charging document on the defendant.

White also stated that a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privileged [sic] against self incrimination and his right to counsel when it attempts to prove a waiver of Miranda rights.

And just as an interesting aside, it's interesting that the case law talks repeatedly about that the case law talks repeatedly about the heavy burden on the State to demonstrate a knowing intelligent waiver. And they never define that. They just say it's a heavy burden. They don't say anything that we would understand. They don't say preponderance or clear and convincing or what.

In contrast, as the State pointed out, and I think correctly in their memo, the burden appears to be simply preponderance for

showing voluntariness. So, we are talking about two different issues. Voluntariness versus the burden that rests on the State to show a knowing and intelligent waiver.

The White case further stated,

> "Even if a question appears innocuous on its face, however, it may be beyond the scope of the **[9]** routine booking question exception if the officer knows or should know that the question is reasonably likely to elicit an incriminating response. Assessment of the likelihood that an otherwise routine question will invoke an incriminating response requires consideration of the totality of the circumstances in each case. With consideration given to the context in which the question is asked.
>
> The fact that the answer to a booking questions [sic] assists the prosecution in proving its case is not determinative of whether a standard booking question, when posed, was likely to elicit an incriminating response. A benign question in one case may amount to interrogation for which Miranda warnings would be required in another case.
>
> Therefore, courts should carefully scrutinize the factual setting of each encounter of this type keeping in mind that the critical inquiry is whether the police officer based on the totality of the circumstances knew or should have known that the question was reasonably likely to elicit an incriminating response."

That language, I feel is very, very important in this case. Again,

> "Courts should carefully scrutinize the factual **[10]**

setting of each encounter keeping in mind that the critical inquiry is whether the police officer based on the totality of the circumstances knew or should have known that the question was reasonably likely to elicit an incriminating response.

Consequently, our holding in Hughes reaffirms that our case by case review should focus on the conduct of law enforcement officers in obtaining the incriminating statement when assessing whether a Miranda violation has taken place."

In Ratavosky, similar to this case, defendant after being arrested for burglary invoked his right to counsel. Over the next two days police initiated conversations with him relative to other crimes. Ratavosky later signed a Miranda waiver form waiving his right to counsel and his right to remain silent.

These statements were ultimately suppressed by the court because the police initiation of conversations with the defendant was improper. This is a case like Mr. Blake's where he has invoked his right to counsel, was re-Mirandaized [sic] and he waived rights on paper and the court still found no valid waiver existed.

Like Edwards versus Arizona, the case of Michigan versus Mosely distinguishes between an invocation of a right to an attorney and in invocation of the right to remain silent. **[11]** An attorney must be furnished before any interrogation occurs when defendant has requested counsel.

Fair versus Michael, another Supreme Court case at 442 United States 707, stated, "There is a per se prohibition against all interrogations after an arrestee has requested counsel."

In Ratavosky, three hours passed between his invoking right to counsel and police interrogation. In Edwards versus Arizona, 12 hours. And in our case it's either 28 minutes if you are looking at the first statement. Or one and a half to two hours if you are looking at the second statement.

Ratavosky further stated, quote,

"But even if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel is initiated by the accused where reinterrogation follows, the burden still remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during that interrogation."

Most interesting to me is the fact that Ratavosky's entire analysis is a Miranda analysis. Not a voluntariness of confession analysis. Leading to the conclusion that where there is a Miranda violation of the defendant's right to have counsel present before any interrogation occurs, the court's **[12]** initial and primary focus should not be on whether or not the confession was voluntary. But as in Edwards and Edwards made clear a knowing and intelligent waiver existed.

Finally, worth mentioning are the cases Kaupp versus Texas, a May 5, 2003 Supreme Court decision and Jones versus State of Maryland, at 311 Md. 398. Jones essentially stands for the proposition that where the arrest of a juvenile is concerned, parental notification or the presence of parents are important factors in determining voluntariness of a confession, but lack of access to parents does not automatically make the juvenile's statement inadmissible.

Kaupp is a case decided on a slight [sic] different issue. An

illegal arrest. But it is very similar to our case factually. In that case a 17 year old was removed from his house at 3:00 in the morning, awakened from his bedroom with a flashlight, handcuffed, shoeless, in boxer shorts and a t-shirt.

That case citing Brown versus Illinois, another Supreme Court case with approval, held that Miranda warnings alone and per se cannot always break for Fourth Amendment purposes the causal connection between the illegality and the confession.

The State urges the Court to take an approach where voluntariness is considered first and asks the question, was the Defendant's will overborne by any improper police conduct. **[13]** I believe the case law requires instead, on these facts and these issues, that the Court analyze the Miranda slash right to counsel issue first.

In fact, as Ratavosky instructs, where there is an insurmountable Miranda violation sometimes the Court does not get to the voluntariness of the confession itself.

This is true simply because as Edwards versus Arizona makes clear, waivers must meet three types of criteria. One, voluntariness. Two, they must be knowing. And three, it must be an intelligent relinquishment of known rights. Not just voluntariness of confession.

It is important not to fall into the same trap as did the Arizona State Court in Edwards versus Arizona, and focus solely on whether the confession was given voluntarily instead of focusing on whether the Defendant understood his right to counsel and intelligently and knowingly relinquished it.

So I am convinced the first inquiry for this Court must be made on the right to counsel issue. Here, we have a 17 year old

young man removed by force on a chilly October morning somewhere between 4:30 and 5:00 o'clock in the morning. Ordered at gunpoint to lay on the floor. He is handcuffed. Removed from his home in his underwear with no shoes on.

Circumstances were sufficiently compelling that Defendant apparently said, "Don't shoot" to the officers. **[14]** Approximately a dozen armed police officers were present inside and out without consultation with or knowledge of his mother. He was taken directly to a police car out front and driven three to four miles to the Annapolis Police Department.

This 17 year old is of average intelligence. Can read and write. Completed the tenth grade. Had thoughts of going to college and becoming an electrician. And was very polite and cooperative with authority figures.

This 17 year old had been arrested for drug charges on two prior occasions, but had never been advised of Miranda rights or interrogated by police before. He was sober, not on any medication, had used marijuana numerous times in the past, but there was no evidence of any use near the time of his arrest. He indicated he had a sip of alcohol at 9:00 or 10:00 the previous evening.

The first question I would ask is was he in custody? I believe the State concedes that he was. He was arrested, cuffed pursuant to a valid arrest warrant. And was not free to leave. He was therefore in custody.

The next question I would ask is was he advised of his rights pursuant to the Miranda decision? The answer should be yes. And it is. Immediately he was advised. I believed both Officers Johns and Hannon when they testified the Defendant was not told of his charges or advised of the fact that Tolbert

had accused him of being the shooter. Neither **[15]** Johns or Hammond were armed. And they were the only two present with the Defendant.

Next question, did Blake invoke his right to counsel? The answer is yes. He requested the presence of an attorney before any questioning could occur. He signed an advice of rights form at 05:11 hours. At this point, Miranda and Edwards require that the Defendant be afforded an attorney before any interrogation by police.

There were no questions or interrogation by police at this point. He was then transported to a cell by 5:25 a.m. in the morning. Evidence revealed that the cell was chilly, cold, and room temperature. All three different descriptions that Detective Johns gave at various times in his testimony.

The Defendant was still in underwear with no shoes on. During this time, the Defendant made no statements and asked no questions. There was, as of this point, no indication the Defendant would change his mind.

At approximately 6:00 a.m., Detective Johns and Officer Reese, and Officer Reese, by the way, was the same officer who had previously transported the Defendant to the Annapolis Police Department. They both walked back to his cell.

As in Edwards, Defendant did not request or suggest that the officers should come back to his cell. Defendant was awake. Johns took the statement of charges back to the **[16]** Defendant, handed them to him, and read the charges to him. Johns testified, and this is a quote, "I said to him, they are serious charges. He needs to read it carefully and make sure he understood it."

As Johns turned to walk out, Reese said, in a confrontational loud voice, "I bet you want to talk now, huh!" Johns testified he was surprised by this. Later, Sergeant Kirchner testified that he observed that Johns was very angry about this. And it was told that Johns put his hands in front of him and pushed slashed escorted Reese out of the area, stating in a very loud voice, "He already asked for a lawyer. We cannot talk to him now."

They left and shut the door. It should be noted that almost contemporaneously with Reese's statement, Johns had handed Defendant the statement of charges, read them to him, advised him that they were serious charges and that he should read over them.

He also erroneously served him with a document which stated that the penalty for count one murder was death. The word death being written in all capital letters. Defendant was, in fact, not eligible for the death penalty.

This was either done intentionally or by mistake. Given the Court's perception of Detective Johns' testimony on the whole, however, as being very credible, and even testifying to matters which are certainly not in his best interest, I **[17]** believe this was done by mistake on his part or on the commissioner's part.

No matter who was responsible for death being typed in capital letters on the penalty section for murder, it was still State action.

So the next question is was there interrogation? Was there a statement made by the police which the police knew or should have known would be reasonably likely to elicit an incriminating response? That answer has to be yes. And, in fact, I had already concluded as much at the motions hearing.

Under the relevant case law which I have now had an opportunity to study since that day, there is simply no possible interpretation of Reese's statement and the manner in which it was made which could indicate that it is not interrogation.

The Defendant had seen Reese before. Reese transported him to the police department. It cannot be said that that statement was a part of the routine booking questions.

Detective Johns testified that Reese knew that Mr. Blake had invoked his right to counsel before they went back to the cell. The State in its memorandum has variously characterized Reese's statement as, I quote, "A single off handed statement." Later it was characterized as, again quote, "A snide off handed comment." And again, the State **[18]** characterized it as, I quote, "An improper off handed comment by an inexperienced police officer."

The State goes on to point out that there was no common design between Johns and Reese to get the Defendant to talk. The State further argued that Johns took corrective measures immediately after he heard Reese make that remark.

The State wrote in its memo, and I quote,

> "These actions taken on the part of Detective Johns clearly eliminate any notion that Officer Reese's comment was designed to elicit any type of response from the Defendant."

On the contrary, what those actions by Detective Johns suggest is precisely what he stated at the motions hearing, which was that Reese had interjected police interrogation into a situation where Defendant had invoked his right to counsel. He testified he was very concerned that Reese's statement to

Defendant violated his right to counsel. And I think Detective Johns was right about that.

I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement.

There is no requirement in a right to counsel analysis that more than one police officer intend to elicit an incriminating statement from a Defendant. The fact that Johns **[19]** may not have intended it and other members of the police department did not intend it, does nothing to negate Reese's obvious intent.

So the question is how do we know what Reese intended. Well, let's analyze the remark he made. Defendant is handed a statement of charges indicating to him, a 17 year old, indicating to him for the first time that he is being charged with murder and he can get the death penalty.

Reese's statement was, "I bet you want to talk now, huh!" This is not a vague appeal to Defendant's conscious like the remarks were in Brewer versus Williams. First, the statement, itself, suggests he should want to talk. And the word, "now" that is, "I bet you want to talk now" clearly refers Defendant to what has just been handed to him.

In other words, look at those charges, look at that penalty, and I'll bet you will want to talk. What ever other meritorious arguments the State makes with reference to this motion, it is simply impossible for this Court to conclude that that particular statement is not interrogation.

It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is indirect

response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement.

So, until 6:28 when they came back there had been no **[20]** opportunity for the Defendant to ask if he could talk to them. Since 28 minutes had passed, he asked, "I can still talk to you?" Even though that period of time had passed.

Is there any possible interpretation of that statement that it is, as the State has urged the Court to find, simply an innocent offhanded comment not meant or expected to elicit an incriminating response? I don't think so.

Examples of innocent offhanded comments not likely to elicit an incriminating response would be, quote, "Here are some clothing for you." Or, "Please move away from the door so I can unlock it." Or, "Do you need a drink of water."

United States versus Walker instructs courts to look at the context in which the statement is made. Once again, the context is the statement was made to a 17 year old with no Miranda or interrogation experience, who was still in a chilly cell in his underwear with no shoes on, without a parent present or available, just as he is being handed papers advising him he is charged with murder and can get death.

The statement invites him to look at those documents when Reese says "now" because nothing else has occurred but the handing over of those documents to which Reese could possibly be referring.

The law states that merely giving the Defendant a copy of his charges does not amount to interrogation and is part of a lawful booking process. Had Defendant been handed a **[21]** statement of charges indicating he was charged with shoplifting or

possession of marijuana, with maximum penalties of 18 months or one year, Reese's statement would not have had nearly the impact it did in this case.

That statement, under these circumstances, was enough to make an adult repeat offender squirm, not alone a 17 year old.

To conclude on this issue there was interrogation before counsel had been provided to Blake. The interrogation was of a coercive nature. And spoke directly to getting the Defendant to talk. And that constituted a violation of the holdings in Miranda and Edwards versus Arizona.

The Court must address though the obvious conflict in the evidence about whether Officer Reese was ever even in that cellblock along with Detective Johns. And whether he ever made the statement to the Defendant which has been attributed to him.

The Court finds Detective Johns to be the more credible witness. That is more credible than Officer Reese. This is for a number of reasons. Number one, police are not likely to make up facts which are highly damaging to their own case. If police were inclined to make up facts, common sense dictates that those facts would be helpful to their case and not harmful to their case.

Two, Detective Johns testified in a manner which I **[22]** found convincing and truthful. Three, Detective Johns did not keep this whole matter a secret like he could have. He could have been dishonest. He could have withheld this. Instead he told his supervisor about it, who told him to put it in a report, which he did.

Four, Officer Johns' version is corroborated by the

Defendant's version. Five, Officer Reese is the only person who said Defendant spontaneously sated, [sic] not in response to any question or remark, "I want to talk to someone." Followed by Reese saying, "Who?" And the Defendant saying, "The detectives."

Officer Reese's testimony regarding other issues about who was at the station first conflicted with Officer Hannon's and Detective John's testimony.

And finally, my seventh reason, Sergeant Kirchner's testimony regarding what Detective Johns told him on October 26th is almost identical to what Officer Johns' testimony was and not even close to what Officer Reese's testimony was.

So I believe Officer Johns' version and not Officer Reese's version. To add to the coercive nature of the situation in the cellblock, I was struck by how much this scene looked like a good cop, bad cop routine. Not that there is anything per se illegal about good cop, bad cop, as an interrogation technique, if the interrogation does not **[23]** otherwise afoul of the law.

This view of the actions of the police in the cellblock bolsters the Defendant's testimony when he stated he was scared, shook when he heard Reese make that remark and saw he was facing death.

The police testified Defendant was calm, polite and cooperative. Reese appears in this setting, in that cellblock, as an out of control, not by the book, police officer, being reigned in by Detective Johns when Johns pushes Reese out of the cell and states in a loud voice that the Defendant said he wanted an attorney. This adds to the coercive atmosphere. It does not detract from it.

Now I turn to wether [sic] the Defendant voluntarily, knowingly, and intelligently waived his right to an attorney. At about 6:28 a.m., Detective Johns returned with clothing for the Defendant. The Defendant has been in police custody since 5:08 and at the Annapolis police department since 5:11, and in the cell since 5:25.

So at least one hour he has been in the cell without clothing. No counsel has been provided to him. Defendant says, "I can still talk to you?" Defendant has no [sic] initiated a conversation with Johns after he has been interrogated without counsel 28 minutes earlier.

Defendant was asked if he changed his mind and he stated, "Yes." Detective Johns was interested in knowing why **[24]** the Defendant changed his mind, but he did not inquire. Defendant was readvised of his Miranda rights, signed the form indicating he would speak to them without an attorney.

Aside from what occurred at 6:00 o'clock that morning, there had been no other threats, physical coercion, or promises made at this point to get the Defendant to talk. Defendant never requested to see or speak with his mother.

It is of some concern, however, that Detective Johns did not testify that he made any effort, whatsoever, to obtain an attorney for the Defendant so that he could question him. Defendant thereafter made an incriminating statement.

At this point the State has a heavy burden of proving that a Defendant voluntarily, intelligently, and knowingly waived his previously invoked right to counsel. And that his pro forma waiver was in no way due to the unlawful and coercive interrogation coupled with Defendant's receipt of the charging documents erroneously indicating that he was facing the death

penalty.

Detective Johns testified that he did not know if Reese's comment had had an impact on the Defendant's change of mind. But again I quote from Ratavosky,

> "Even if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel is initiated by the accused where reinterrogation follows the burden **[25]** remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation."

Here, Defendant is still in custody, still at the Annapolis police department. Only 28 minutes has gone by since the illegal interrogation. Enough time for him to read the charging document and only one hour and 17 minutes since he invoked his right to counsel.

He is still 17 years old. Still undressed. Still in a cold cell, where he is facing death. And an officer had made a case for him to speak now through that officer's coercive statement.

He has no parent present. The Defendant testified that he was scared and cold and though [sic] he was facing death. The State urges the Court to accept that Officer Reese's statement did not impact the Defendant's change of mind, but the Defendant changed his mind after reading the statement of charges and learning his co-defendant had pointed to him as the shooter.

And further, that since it has been held that the mere act of providing a defendant with a statement of charges does not amount to unlawful interrogation, it was not an illegal police

action which prompted him to confess.

The problem is there is very little evidence of **[26]** that. Defendant conceded he learned that Tolbert blamed the murder on him and that he wanted the police to know the truth about these statements.

The State has not met its heavy burden of proving a voluntary, knowing, and intelligent waiver or showing that he was not still suffering under the impact of Reese's unlawful course of interrogation.

Once Defendant made certain incriminating statements, he was then asked by Detective Johns if he wanted to take a polygraph. This is all one continuous stream of events. There was no break in time or place here. No attenuation.

Defendant testified he asked if it would help him and Detective Johns said, "Yes." Detective Johns and Detective Hannon testified that it was possible that the Defendant could have been asked that question.

Detective Hannon testified that if he was asked the question that he, Hannon, definitely did not answer yes to the Defendant. And he does not know whether Detective Johns told the Defendant it would be helpful if he took a polygraph.

According to the Defendant, he also asked Lloyd White if it would help if he took a polygraph. And White testified that he did not recall if Defendant asked that question.

I am very uncertain, actually, based on the evidence **[27]** I have heard, whether or not the Defendant ever asked that question. According to Officer Hannon the Defendant may have asked that question.

But even if he did not ask that question, that failure on his part to ask the question and receive an affirmative response by the police does nothing to assist the State in overcoming their heavy burden of showing a knowing and intelligent waiver, not influenced by Reese's statement.

The polygraph process began at about 8:30 or 9:00 o'clock with Defendant's mother present at the Maryland State Police barracks. She signed a consent form but never saw or spoke to the Defendant. We now have a change of location and the re-Mirandaizing [sic] of the Defendant.

However, this is all one continuous course of conduct beginning with Office [sic] Reese's statement and other coercive circumstances. Defendant had, as some cases talk about, already let the cat out of the bag. It is unlikely that an honest 17 year old who is respectful of authority would realize he could turn back now.

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to counsel.

He was thereafter interrogated by police in **[28]** violation of Miranda and Edwards. The State must prove his subsequent pro forma waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden.

The motion to suppress is therefore granted as to any and all statements Defendant made at the Annapolis police department. And any and all statements that he made at the Maryland State Police barracks.

Is there any [sic] further at this time, then?

MR. PAONE: No, Your Honor.

MR. RAVENELL: Nothing from Defense, Your Honor. Thank you.

MR. PAONE: Excuse me, Your Honor. Your Honor, the State would request that the Court make a finding regarding voluntariness of the statement for possible impeachment purposes down the road.

THE COURT: Okay.

MS. ALBAN: To consider it at some point - -.

MR. RAVENELL: Are you asking for that now or later?

MS. ALBAN: No. No. If the Court, I mean, I don't know if the Court is prepared. I mean I understand we can't use the statement now in our case in chief. But, if the Court finds it involuntary, we can't use it for impeachment purposes. If the Court finds that it was voluntary, we may be able to use it for impeachment purposes should the Defendant take the **[29]** stand.

THE COURT: Okay.

MS. ALBAN: So, prior to the trial date.

THE COURT: Well, just by way of comment, I mean, if you want me to address that in more detail, I will. I felt that that was what I was addressing in the latter part of my opinion.

MS. ALBAN: Okay. I just wanted to clarify.

THE COURT: Where I went from the original Miranda analysis into the whole voluntariness analysis.

MS. ALBAN: Thank you. I just wanted to be crystal clear on that. Thank you.

THE COURT: Okay. You are welcome.

MR. RAVENELL: Thank you, Your Honor.

(Whereupon, the hearing was concluded.)

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 771

September Term, 2003

STATE OF MARYLAND

v.

LEEANDER BLAKE

Eyler, James R.,
Bloom, Theodore G.
(Ret., specially assigned),
Karwacki, Robert L.
(Ret., specially assigned),

JJ.

Opinion by Eyler, James R., J.,
Dissenting opinion by Bloom, J.

Filed: October 29, 2003

The State appeals from an order entered by the Circuit Court for Anne Arundel County granting a motion to suppress incriminating statements by Leeander Jerome Blake, appellee, on the ground that the statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966).[1] We conclude that the circuit court erred and, consequently, shall reverse its ruling.

As a preview, the core facts are (1) appellee, while in custody (2) was advised of his Miranda rights, (3) appellee did not waive those rights and requested counsel, (4) police officers gave appellee a statement of charges, (5) at or about the same time, a police officer made a comment to appellee, (6) approximately 30 minutes later, appellee expressed a willingness to talk to police, (7) appellee was again advised of his Miranda rights, (8) appellee provided incriminating information, (9) appellee agreed to take a lie detector test, (10) appellee was again advised of his Miranda rights, and (11) appellee provided additional incriminating information.

Accepting the hearing court's first level findings of fact, and looking at the facts most favorable to appellee, we shall assume that the contact which resulted in the incriminating statements was, at least in part, in response to the comment by the police officer. The precise question before us, therefore, is whether the comment constituted "interrogation" within the meaning of Miranda and Edwards v. Arizona, 451 U.S. 477 (1981). We

[1] Miranda requires that a person in custody be advised of the right to remain silent, the right to the presence of an attorney, retained or appointed, and that any statement made may be used as evidence. 384 U.S. at 444. If the warnings are not given, a statement that is the direct product of the violation is not admissible in evidence, even if voluntary in a due process sense. Michigan v. Tucker, 417 U.S. 433, 443 (1974).

answer that question in the negative.

Evidence at Suppression Hearing

On September 19, 2002, Straughan Lee Griffin, a resident of Annapolis, was shot and killed. On October 25, 2002, Terrence Tolbert was arrested and charged in connection with the homicide. On October 26, 2002 at approximately 5:00 a.m., at his home, appellee was arrested and charged in connection with the homicide. Following his arrest, appellee made incriminating statements to the police regarding his participation in the crime.

Appellee moved to suppress the statements on (1) traditional due process and State law grounds and (2) a violation of Miranda and Edwards. On May 9 and 16, 2003, the circuit court held a hearing on appellee's motion to suppress his statements.

At the hearing, the State called Detective William Johns, a detective with the Annapolis Police Department, and the lead investigator. He testified to the following. After appellee was arrested, he was transported to the Annapolis Police Department and Detective Johns, in the presence of Corporal Thomas Hannon, advised appellee of his rights, pursuant to Miranda. Appellee initialed each section of the advice of rights form as it was explained to him. Appellee invoked his right to counsel, and at approximately 5:25 a.m., appellee was placed in a holding cell.

At 6:00 a.m., Detective Johns, accompanied by Officer Curtis Reese, went to appellee's cell and gave him a copy of the statement of charges and the application for statement of charges. Detective Johns explained the charges, told appellee to read the documents carefully, and turned to walk out. When

Detective Johns turned to leave, Officer Reese said something to the effect, "I bet you want to talk now, huh?" Detective Johns stated that not enough time had elapsed for appellee to have read the charges when Officer Reese made the statement. Detective Johns, surprised by the comment, said loudly, so appellee would hear, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now" and walked Officer Reese out of the cell block. Detective Johns then reported what had occurred to his supervisor, Sergeant Greg Kirchner.

When appellee was arrested, he was wearing a T-shirt and boxer type shorts. It was a "little chilly" or "cold" in the cell. Detective Johns knew that someone was bringing clothes for appellee from appellee's house, but he did not know who. At approximately 6:30 a.m., after the clothes had arrived, Detective Johns took the clothes to appellee. As Detective Johns turned to walk out of the cell block, appellee asked if he could talk to him. Detective Johns left the cell area and reported to Sergeant Kirchner and Corporal Hannon.

At approximately 6:40 a.m., Detective Johns took appellee to an intake room. Once they arrived, Detective Johns asked appellee if he had initially stated that he wished to exercise his rights and had changed his mind. Appellee answered in the affirmative. Detective Johns again reviewed the Miranda warnings, and appellee initialed the advice of rights form. Appellee stated that he wished to speak and gave a statement during which Detective Johns learned that appellee was 17 years old, was in the 11th grade in school, was sober, not on medications, and had two previous contacts with the police department. The contacts were on July 29, 2001 and January 30, 2002. Detective Johns testified that appellee was calm and cooperative during the interview, which took approximately one hour. Appellee was not handcuffed, no weapons were

present, and no threats or promises were made to appellee. The parties stipulated at the suppression hearing that appellee's statement contained incriminating information.

After the statement, Detective Johns asked appellee if he was willing to take a polygraph test, and appellee agreed. Detective Johns contacted Corporal Lloyd E. White, Jr., with the Maryland State Police, to conduct the test. Appellee's mother was also notified, and she consented to the test. The test was conducted at the State Police Barracks in Annapolis. Corporal White gave appellee the Miranda warnings again before conducting the test. The parties stipulated that appellee made incriminating statements during the polygraph examination and thereafter.

Corporal White, called by the State, testified to the following. On October 26, 2002 he met with Detective Johns, appellee, and appellee's mother. Appellee's mother consented to the polygraph test. Corporal White advised appellee of his Miranda rights and then administered a polygraph test. He stated that no threats or promises were made to appellee, and appellee was "very eager" to speak. Corporal White testified that he did not believe certain statements by appellee, and he asked appellee if he could offer any explanation for his disbelief. At that point, appellee provided additional incriminating information about the crime. The process began between 9:15 and 9:25 a.m. and took approximately two and one-half hours.

Mary Ann Costello, a State's witness, testified to the following. At the time of the hearing, she was a juvenile counselor employed by the Department of Juvenile Justice. She was appellee's probation officer from March 1, 2002 until his case was "rescinded" on August 23, 2002. Ms. Costello described appellee as intelligent and polite and stated that he

had complied with his probation requirements. Ms. Costello also stated that appellee had a part-time job and was going to school and that he had had other part-time jobs in the past.

Appellee called Officer Reese, who testified to the following. After appellee was arrested, Officer Reese transported him from appellee's home to the police station. At approximately 6:00 a.m., Officer Reese entered appellee's cell block, pursuant to a policy of routinely checking on prisoners. Appellee stated that he wanted to talk to someone. Detective Johns, who was not at the cell with Officer Reese but was in the area, shouted that appellee had requested an attorney, and Officer Reese left. Officer Reese denied saying anything to appellee.

Appellee's mother, Lawanda Pierce, testified on his behalf and described the details of his arrest.

Appellee testified that, at approximately 4:00 a.m., he was watching cartoons on television when the police officers arrived at his house. He stated that he had slept three hours the previous evening, had been awake thereafter, and this was not unusual for him. When appellee was arrested and taken to the police station, he was wearing a tank top and underwear. At the station, Detective Johns asked appellee if he knew why he was there and he said yes. Appellee had not been given any information about his arrest prior to that time. After asking appellee if he knew why he was there and appellee's response, Detective Johns advised appellee that Mr. Tolbert had identified appellee as the shooter. Appellee testified that he was "scared" and "shaky." Detective Johns advised appellee of his Miranda rights. Appellee stated that he understood them, and he invoked his right to counsel and to remain silent.

Appellee was thereafter placed in a holding cell. Several minutes later, Detective Johns and Officer Reese came in and

gave appellee the statement of charges. Appellee stated that he saw the charges, saw that he was facing death, and heard Officer Reese say, "I bet you want to talk now, huh?" Appellee testified that "I was just scared. I just got my charges and I was just shook." Detective Johns pushed Officer Reese out of the cell block but returned later and asked appellee if he wanted to talk. Appellee asked if he could, and Detective Johns said yes. Appellee denied that any conversation occurred when Detective Johns brought him his clothes, and stated that he received his clothes prior to the time that Detective Johns asked him if he wanted to talk.

Appellee testified that he decided to talk because of Officer Reese's comment and because of the content of the charges. With respect to the latter, appellee testified that he lived close to Mr. Tolbert, was friendly with him, and saw him frequently. Appellee learned from the statement of charges that Mr. Tolbert had advised the police that appellee shot the victim, took the victim's car keys from his pocket, and ran over the victim with the victim's car. Appellee further testified that he felt angry and betrayed, and he wanted the police to know the truth, i.e., that Mr. Tolbert was the one who shot and ran over the victim.

With respect to the polygraph examination, appellee testified that Detective Johns told him taking the test would help him and that later, Corporal White said the same thing.

Appellee explained that his two prior arrests were drug offenses. He was given juvenile citations and released to his parents. He was not given Miranda warnings on either of those occasions. Nevertheless, he had seen Miranda warnings on television, and he understood all of the rights. Appellee stated that he was without his clothes less than an hour, and he was not cold after he received them.

In rebuttal, Sergeant Kirchner, Corporal Hannon, and Detective Johns testified. Sergeant Kirchner confirmed Detective Johns' testimony with respect to what Detective Johns had reported to him. Corporal Hannon denied that appellee had been told taking a polygraph test would help him. Detective Johns also testified that he did not tell appellee taking a polygraph test would help him, and that, at his first meeting with appellee, he did not say anything about Mr. Tolbert before giving appellee his Miranda rights.

The advisement of rights forms, containing Miranda warnings and appellee's initials, were introduced in evidence. One form was dated October 26, 2002 with a time notation of 5:11 a.m.; another form bears the same date with a time notation of 8:40 a.m.; and the third form bears the same date with a time notation of 9:20 a.m. The first form, in response to the question whether appellee would talk without a lawyer, contains the handwritten "no." The second form, in response to the same question, contains the handwritten "yes."

The statement of charges and application were also introduced into evidence. The application recites that on September 19, 2002 investigation disclosed that the victim had been shot in the head, his vehicle stolen, and that he had been run over with his vehicle. Additionally, on October 25, 2002, Mr. Tolbert, who had been identified as a suspect, was interviewed and admitted to being one of two persons who had committed the crimes. Mr. Tolbert identified appellee as the other person and advised that appellee was the shooter and the driver. The statement of charges contained columns with the following headings: offense number, charge or citation number, the applicable statute, the penalty, and a description of the charge. The penalty entry is the maximum penalty allowed and is computer generated when a particular charge is entered into the system. At this stage of the proceedings, the penalty entries

are not keyed to a particular defendant. The statement of charges contained the following charges and penalties: first degree murder – death; second degree murder – thirty years; armed robbery – twenty years; armed carjacking – thirty years; and use of a handgun – twenty years.

On June 3, 2003, the court granted the motion to suppress.

Circuit Court's Opinion

The State conceded that, after appellee was arrested and brought to the police station, he was in custody. The court, after acknowledging that, found the following. Appellee was immediately given Miranda rights. The court believed Detective Johns and Corporal Hannon, who testified that they did not advise appellee, prior to giving Miranda warnings, that Mr. Tolbert had accused appellee of being the shooter. The court found that appellee requested counsel and was taken to a cell at 5:25 a.m.

At approximately 6:00 a.m., Detective Johns and Officer Reese went to appellee's cell. Detective Johns gave appellee the statement of charges, read them to him, and advised him that they were serious charges, he should read them carefully, and make sure he understood them. As Detective Johns turned to walk out, Officer Reese, in a confrontational loud voice, said "I bet you want to talk now, huh?" The court resolved the credibility issue in favor of Detective Johns and appellee and against Officer Reese with respect to whether Officer Reese made such a comment. Detective Johns escorted Officer Reese out of the area, stating in a very loud voice, "He already asked for a lawyer. We cannot talk to him now." The two officers left the area.

The court observed that the statement of charges reflected

death as the penalty for first degree murder, that appellee was in fact not eligible for the death penalty, and that the penalty was included by mistake on the part of Detective Johns or the court commissioner.

Applying an objective test, the court held that the comment by Officer Reese constituted interrogation and that Officer Reese intended to elicit a response from appellee. The court concluded that the State had not met its burden of showing that appellee subsequently voluntarily, knowingly, and intelligently waived his right to remain silent after requesting counsel. Specifically , the court stated that the State failed to prove that the waiver was "in no way due to the unlawful and coercive interrogation coupled with Defendant's receipt of the charging documents erroneously indicating that he was facing the death penalty."

The basis of the circuit court's opinion was that Officer Reese's comment constituted interrogation in violation of Miranda and Edwards, thus making appellee's subsequent waivers invalid and his statements inadmissible. The court made it clear that its decision rested on a violation of Miranda and Edwards, and not that appellee's statements were otherwise involuntary. With respect to the second statement given during the polygraph exam, and referring to appellee's testimony that he had been promised help, the court observed that it was not convinced that any statements had been made to appellee, promising that taking the polygraph test would help him.

Standard of Review

As recently stated by the Court of Appeals in White v. State, 374 Md. 232, 250 (2003):

On appellate review . . . we will accept the facts as found

by the hearing judge unless those facts are clearly erroneous. See Riddick v. State, 319 Md. 180, 183 (1990). In addition, the evidence is to be viewed in the light most favorable to the prevailing party, [in this case, appellee]. See id. Nevertheless, we will undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case. See id.

Discussion

The State contends that the comment made by Officer Reese was not interrogation. Alternatively, even if it was interrogation, (1) it was attenuated by appellee's reading of the statement of charges and application, properly given to him, because appellee's statements were in response to what appellee learned in the statement and application and not in response to the interrogation, and (2) appellee was re-Mirandized and validly waived his rights prior to his statements.

Appellee contends that Officer Reese's statement was interrogation and that appellee's statements were, at least in part, in response to the interrogation, and that this Court is bound by the circuit court's findings in both respects.

We shall begin by applying the general standard of review to this case. We accept the circuit court's determination that Detective Johns was a credible witness and that Officer Reese made the comment in question. While it is not entirely clear whether the circuit court found that Officer Reese subjectively intended to elicit an incriminating response, we shall assume that he did. As it is a question of constitutional law, however, whether the police actions constituted interrogation is subject to de novo review. Riddick, 319 Md. at 183.

The parties argued, and the court discussed, cases dealing with Fourth Amendment rights, Fifth Amendment rights, Sixth Amendment rights, Miranda rights, the exclusion of evidence as a sanction for violations, and waivers of the above rights by a person in custody. Although it is clear, as previously stated, that the court's conclusion rested on Miranda and Edwards, it is not clear whether the court (1) held as a matter of law that appellee's statements were inadmissible as a result of what it found to be unlawful interrogation, regardless of whether the statements were in response to learning from the statement of charges and application that Mr. Tolbert had identified appellee as the leading participant, as distinguished from Officer Reese's comment, or (2) whether the court found, as a fact, that appellee's statements were, at least in part, in response to the interrogation and thus tainted by the Miranda violation.

We shall summarize some basic principles to narrow our focus to what we perceive to be the determinative issue. The exclusionary rule does not serve the same purpose in Fourth Amendment and Fifth Amendment jurisprudence. Consequently, the fruit of the poisonous tree doctrine, a concept related to the exclusionary rule, is applied differently, depending on the nature of the violation. Oregon v. Elstad, 470 U.S. 298, 303-04 (1985).[2] In the former, the concern is with police conduct; in the latter, the concern is with trustworthiness of the information. Id. Compare State v. Lee, 374 Md. 275,

---

[2] The fruit of the poisonous tree doctrine requires a primary illegality and a cause and effect relationship between it and the evidence. The fruit is not poisoned if sufficiently attenuated from the illegality, was obtained from an independent source, or would have been inevitably discovered. See Judge Moylan's discussion in Gibson v. State, 138 Md. App. 399, 402-19 (2001).

297-98 (2003) (noting that the primary reason for excluding evidence obtained as a result of a Fourth Amendment violation is to prevent improper police conduct), with Ashford v. State, 147 Md. App. 1, 41-41 (2002) (citing Elstad and noting that the exclusionary rule, as applied to the Fifth Amendment, "is concerned with the ultimate trustworthiness of the evidence.").

In Oregon v. Elstad, the Supreme Court did not apply the traditional fruits doctrine, as developed in Fourth Amendment cases, to a Miranda violation. 470 U.S. at 318. A Miranda violation does not necessarily prevent subsequent statements from being admitted into evidence if the defendant is properly Mirandized before the statements are given and the statements are otherwise voluntary. Id. In other words, a mere Miranda violation, if followed by a voluntary and knowing waiver, does not trigger exclusion under the fruit of the poisonous tree doctrine. Id.

Apart from the Sixth Amendment, when a defendant requests an attorney, however, as opposed to merely invoking his or her right to remain silent, additional protections come into being. Edwards, 451 U.S. at 484-85. Once a person in custody requests the presence of an attorney, all interrogation must cease until an attorney has been provided. Id.; Miranda, 384 U.S. at 436. In that situation, the person in custody can initiate an exchange with the police and voluntarily speak, but the police cannot initiate the interrogation; if a statement is made in response to such an interrogation, the statement will be suppressed. Edwards, 451 U.S. at 484-85. The act of re-Mirandizing, standing alone, even if voluntary in the traditional sense, will not avoid such a result. Id. The rule enunciated in Edwards was based on the rights outlined in the Fifth and

Fourteenth Amendments. 451 U.S. at 480.[3]

That does not mean, however, that any and all subsequent statements by a defendant, made without counsel, are necessarily in response to the interrogation. See Correll v. Thompson, 63 F.3d 1279, 1287 (4th Cir. 1995). In the case before us, appellee testified that he felt angry, betrayed, and scared when he learned from the statement of charges that Mr. Tolbert had identified him as the shooter and driver and when he saw the possible penalties for this crime.[4] Appellee also referred to Officer Reese's comment, however, when he explained why he changed his mind and decided to talk. Consequently, pursuant to our standard of review, regardless of whether the circuit court found as a fact that appellee's statements were at least partially in response to Officer Reese's comment or excluded appellee's statements as a matter of law, we shall assume that both statements were, at least in part, in response to Officer Reese's comment. Appellee was in custody

---

[3] The inquiry into who initiated the conversation is separate from the issue of whether the accused waived his previously asserted right to counsel. Radovsky v. State, 296 Md. 386, 401 (1986) (quoting Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality). In addition to proving the conversation was reinitiated by the accused, the State also bears the burden of demonstrating that the accused voluntarily, knowingly, and intelligently waived his right to counsel. Id. In other words, the fact that an accused initiates the conversation with the police does not end the waiver inquiry.

[4] It is well-settled that the act of giving the application and statement of charges to appellee did not constitute interrogation. See State v. Conover, 312 Md. 33, 39 (1988). See also, discussion infra.

when he gave his statements, and there is evidence that he invoked his right to counsel when he was first given his Miranda rights.

The net effect of the above is that the result in this case is determined by whether Officer Reese's comment, considering the totality of the circumstances, constituted interrogation after appellee invoked his Miranda rights, including the right to consult with counsel, and prior to the time that he indicated that he wished to speak to police.

Interrogation includes not only express questioning but also its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). In Innis, the defendant was in custody, given Miranda warnings, invoked his right to counsel, and, while being transported to the police station, the police officers spoke to each other about their concern for the safety of children because a shotgun had not been recovered. Id. at 294-95. The defendant spoke, and the Supreme Court held that the defendant had not been interrogated. Id. at 302.

The Court explained that interrogation includes "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301. This portion of the definition focuses on the perceptions of the person in custody, rather than the subjective intent of the police. Id. "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." Id. With respect to intent, the Court continued:

> This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were

> reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

446 U.S. at 301, n.7.

The Court acknowledged its awareness that police officers might use various techniques of persuasion, such as using coached witnesses to identify the person in custody, and thus, interrogation was not limited to express questioning. Id. at 301-02. The concern in Miranda was that interrogation in custody would "subjugate the individual to the will of his examiner." 446 U.S. at 299. In reversing the Rhode Island Supreme Court, the Supreme Court acknowledged the state court's finding that the defendant had been subjected to "subtle compulsion," but held that such behavior was not enough to constitute the functional equivalent of interrogation. 446 U.S. at 303.

The Court of Appeals interpreted and applied Edwards in Radovsky v. State, 296 Md. 386 (1983). In that case, the defendant was given Miranda rights, refused to waive them, and invoked his right to counsel. Id. at 387. The State conceded that it initiated the subsequent questioning of defendant, but argued that a subsequent waiver of his right to have counsel present attenuated the violation. Id. at 392. See Michigan v. Mosley, 423 U.S. 96 (1975). The Court, relying on Edwards, distinguished between the invocation of the right to remain silent and the right to have counsel present, and held that inculpatory statements obtained after the interrogation were

inadmissible.[5] Id. at 398-99.

In determining whether the police interrogated appellee prior to the time that he asked to speak to Officer Johns, we consider the totality of the circumstances. Hughes v. State, 346 Md. 80, 95, 98 (1997). The test is objective; "whether the police officer, based on the totality of the circumstances, knew or should have known that the question was reasonably likely to elicit an incriminating response." Id. at 95-96. The subjective intent of the police officer in making the statements does not control. Id. at 100.

Importantly, following Innis, the Court of Appeals recognized that "[n]ot all police conduct that may cause a defendant to speak constitutes interrogation." State v. Conover, 312 Md. 33, 39 (1988). In Conover, the Court held that after the defendant requested an attorney, the actions of the police in reading a statement of charges and giving the defendant a copy of the statement and the application was not interrogation. Id. at 44-45. Consequently, the subsequent statement by the defendant was not excluded. Id. at 45. The Court reached the same result in White v. State, 374 Md. 232 (2003). In that case, the defendant invoked his right to counsel, the police read the charging document to him, and the defendant gave an inculpatory statement. Id. at 248-49. The Court held that the police conduct did not constitute interrogation, and the defendant's statement was not excluded. Id. at 254.

In the case before us, it is clear that simply providing appellee with the statement of charges and the application was

---

[5] The Court also noted that even if the person in custody initiates the interrogation by police after invoking a right to counsel, the prosecution still must show a valid waiver.

not an interrogation. As the Court of Appeals observed in the above cases, the rules require that the charging document be served on the defendant. Maryland Rule 4-212(f). The charging document revealed to appellee the charges against him and the maximum penalty for those charges. As is customary, the statement was not tailored to appellee, and the police did not know prior to the statements in question that appellee was under age 18. Additionally, it was not interrogation to provide a copy of the application which contained information obtained from Mr. Tolbert.

Appellee relies on Drury v. State, 368 Md. 331 (2002), but that case is distinguishable. In Drury, prior to being given Miranda warnings, the defendant was shown physical evidence and told that it would be processed for fingerprints. Id. at 337. The defendant was brought to the police station for the express purpose of questioning, and had been informed as much when he arrived. Id.

Appellee also relies on Hughes v. State, 346 Md. 80 (1997), but that case is also distinguishable. In Hughes, the Court of Appeals applied an exception to Miranda, known as the routine booking exception. Id. at 83. The Court held that the exception did not encompass a question on an arrest intake form that inquired whether the arrestee was "a narcotics or drug user." Id. at 97. It was clear that the defendant was being questioned. Id. It also seems clear that the question could reasonably be expected to elicit incriminating information. Id. at 98. Consequently, the admission in evidence of the response was error, absent Miranda warnings. Id. at 100-01.

In our view, this case is very similar to Williams v. State, 342 Md. 724 (1996). In Williams, the defendant was convicted of first degree murder and related offenses and received the death penalty. Id. at 731. The Court reversed the convictions

for reasons not here material, but addressed issues likely to arise on retrial. Id. One of those issues was the defendant's motion to suppress statements made to the police. Prior to Miranda warnings, a police officer showed the defendant a photograph portraying him using the victim's ATM card, and the defendant admitted it was him. Id. at 759. The defendant was then advised of his Miranda rights, and he invoked his right to remain silent and his right to counsel. Id.

The following transpired:

> As the officers began to gather their papers, one of the officers told Williams to remove his earring and Williams mumbled under his breath, 'you can't get me. I'll just say a girl gave me the card.' After this second statement, Detective Zywiolek testified that he commented that 'this is going to work' and reiterated to Williams that he was being charged with the murders of Gilbert and Trias. At that point, Williams made a third statement: 'I know I'm never getting out.'

342 Md. at 759. The Court held that the police actions did not constitute interrogation and Williams' second and third statements were not excluded. Id. at 760-61. The Court explained that the statement, "This is going to work," coupled with again advising the defendant that he was being charged with two murders, "simply advised Williams that police had evidence they believed established Williams's guilt in a double homicide, and as a result was being charged with murder." Id. at 761.

In the case before us, Officer Reese's comment was made during the non-interrogation procedure of giving appellee the charging document and the application. Appellee was in his cell; he was not taken anywhere for questioning. The comment

by Officer Reese was a blurt; viewed objectively it was rhetorical in nature and there was no actual questioning of appellee.

The comment was an obvious reference to the evidence in the possession of the police, as reflected in the application for charges. Regardless of what Officer Reese's intent might have been, the totality of the events indicate that appellee was not expected to respond, and he did not respond. There is no evidence that the events were part of a practice by the police designed to elicit incriminating information; it is to the contrary. Appellee was not "badgered" or subjected to "compelling influences" or "psychological ploys." See Conover, 312 Md. at 45. The statement by Officer Reese was not the functional equivalent of actual questioning, but was the functional equivalent of the statement in Williams, "This is going to work." Each was a reference to the evidence against the person in custody that the police had in their possession.

We hold that the police actions in question did not constitute interrogation.

ORDER GRANTING APPELLEE'S MOTION TO SUPPRESS REVERSED. COSTS TO BE PAID BY APPELLEE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 771

September Term, 2003

STATE OF MARYLAND

v.

LEANDER JEROME BLAKE

Eyler, James R.,
Karwacki, Robert L.,
(Retired, specially assigned),
Bloom, Theodore G.
(Retired, specially assigned),

JJ.

Dissenting Opinion by Bloom, J.

Filed: October 29, 2003

Respectfully, I dissent.

I agree with most of the majority opinion. My sole point of disagreement with it is the majority's conclusion that, as a matter of law, the comment made by Officer Reese to appellee after the statement of charges and the application therefor were handed to appellee—"I'll bet you want to talk now, huh!"—was not the functional equivalent of interrogation. That one point of disagreement compels me to dissent from the decision of the majority to reverse the order of the circuit court granting appellee's motion to suppress inculpatory statements he made after he had requested a lawyer upon being advised of his *Miranda* rights.

The suppression motion hearing judge made specific findings of first level facts, which this Court must accept unless they are clearly erroneous. *Riddick v. State*, 319 Md. 180, 183 (1990). Of particular significance to this case were her findings (1) that when Officer Reese said to appellee, "I'll bet you want to talk now," he intended that comment to induce appellee to talk, *i.e.*, to make an incriminating statement, without waiting for advice of counsel; and (2) that Officer Reese's comment was a factor in inducing appellee to waive his right to counsel and tell Detective Johns his version of what occurred in the events that led to his arrest.

There is no contention that those findings of intent and motivation were not findings of first level facts. In the words of Lord Bowen's famous aphorism, "The state of a man's mind is as much a fact as the state of his digestion.["] *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459, 483.

Nor is there any contention that those findings were erroneous or that there was no evidence to support them. The finding that Reese's comment was a factor in appellee's

decision to waive his right to counsel and tell his version of the events to Detective Johns is supported by his testimony to that effect. The finding that Officer Reese intended his comment to induce appellee to talk, *i.e.*, to tell his version of the event without waiting for advice of counsel is supported by the surrounding circumstances. Detective Johns had read the list of charges to appellee, handed appellee the statement of charges with the application therefor, and told him to read them carefully and that the charges were serious. Then, as Johns turned to walk out, Reese said in a loud voice and a confrontational tone, "I'll bet you want to talk now, huh!" The only logical conclusion was that Reese was suggesting that, when appellee read the charges, with the maximum penalty for each charge noted, and Tolbert's assertion that appellee was the one who killed the victim, he would want to tell his version "now." Detective Johns clearly thought so. He was surprised and angry; he pushed Reese out of the cell and he said that Reese had interjected police interrogation into a situation in which appellee had invoked his right to counsel. He testified that he was afraid that Reese had violated appellee's right to counsel.

Despite the factual determination by the motion hearing judge, the majority hinges its decision on the proposition that whether police actions constitute interrogation is a constitutional law question and thus subject to *de novo* review, citing *Riddick*, 319 Md. at 183.

The evidence clearly shows that when Detective Johns returned to the holding cell to deliver appellee's clothing to him, appellee initiated the ensuing interrogation; he wanted to talk about the case. During the relatively short period of time before Johns returned to the holding cell with appellee's clothes, appellee had read the statement of charges with the computer generated maximum penalty (death for first degree

murder) clearly stated thereon, and he was frightened. He had also read the police application for the charging document and was disturbed by Tolbert's accusation that appellee had shot and run over the victim with the carjacked vehicle. And he had thought about the meaning of Reese's statement, which indicated to him that it was in his best interest to make a statement promptly, so that the police would know the truth about what Tolbert said. Certainly appellee's inculpatory statements were made voluntarily. The issue, however, is whether they were induced by a "substantial equivalent of interrogation" that influenced his waiver of a right to counsel.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court explained that, once an individual has requested counsel, a subsequent statement by him is not tested by the standard of voluntariness; the issue is whether there was a knowing and intelligent waiver of the right to counsel.

> "Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S. at 474.

451 U.S. at 485. *See also Michigan v. Mosley,* 423 U.S. 96 (1975).

Prior to *Edwards,* the Court, in *Rhode Island v. Innis*, 446 U.S. 291, had addressed the meaning of "interrogation." It stated:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questions or its functional equivalent. That is to say, the term interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

446 U.S. at 300-01.

That "interrogation" or the functional equivalent thereof need not be in the form of questions, or even verbal, is illustrated in *Drury v. State,* 368 Md. 331, *cert. denied,* 537 U.S. 942 (2002). In that case, the Court of Appeals held that the conduct of a police officer in placing in front of the defendant, before he had been advised of his *Miranda* rights, the tire iron used in a burglary and a trash bag containing stolen magazines and then telling the defendant that the evidence will be processed for fingerprints, was the functional equivalent of interrogation.

The motion hearing judge correctly concluded that Officer Reese should have known that his statement to appellee was reasonably likely to elicit an incriminating response from appellee. She had found as a fact that Reese intended his comment to elicit such a response. And as the majority opinion recognizes, the officer's intent may have a bearing on whether he should have known that his words "were reasonably likely to evoke an incriminating response." Slip op. at 18. In short, based on the evidence and the first level facts she found on the basis of evidence, the motion hearing judge properly ruled that Reese's remark was the functional equivalent of interrogation; that as such it violated appellee's constitutional rights; and that the State had not met "its heavy burden" of proving a voluntary, knowing, and intelligent waiver, uninfluenced by Reese's improper comment. On that basis, she held that all statements made by appellee at the Annapolis Police station and at the

State Police Barracks (where the polygraph examination was conducted) were suppressed.

I am aware that, by virtue of Maryland Code (1974, 2002 Repl. Vol.), § 12-302(c)(iv) of the Courts and Judicial Proceedings Article, an affirmance of that suppression ruling would result in dismissal of all charges against a defendant who had voluntarily admitted his participation in a carjacking and murder. That would be an extremely harsh penalty for the State, which was not prepared to proceed to trial without the suppressed evidence. Dura lex sed lex.

Leeander Jerome BLAKE
v.
STATE of Maryland.

No. 81, Sept. Term, 2003.

Court of Appeals of Maryland.

May 12, 2004.

Reconsideration Denied June 16, 2004.

Background: State appealed from order of the Circuit Court, Anne Arundel County, North, J., granting defendant's suppression motion. The Court of Special Appeals reversed, and defendant petitioned for writ of certiorari.

Holding: The Court of Appeals, Raker, J., held that officer's remark to defendant stating "I bet you want to talk now, huh" after defendant unequivocally invoked his right to counsel under *Miranda* and detective gave defendant charging document listing the penalty to which defendant was subjected as "death" amounted to the functional equivalent of interrogation.

Reversed and remanded with instructions.

Argued before BELL, C.J., RAKER, WILNER, CATHELL, HARRELL, BATTAGLIA, JOHN C. ELDRIDGE (Retired, specially assigned), JJ.

RAKER, J.

This case is an interlocutory appeal filed by the State[1] from an Order in the Circuit Court for Anne Arundel County granting Leeander Jerome Blake's motion to suppress his incriminating statements on the grounds that the police elicited his statements in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Court of Special Appeals disagreed with the Circuit Court, and in an unreported opinion, reversed. This Court granted Blake's petition for writ of certiorari to consider the single question of whether the police actions in question constituted the functional equivalent of interrogation following petitioner's invocation of his *Miranda* rights, thereby violating petitioner's right against compelled self-incrimination. *Blake v. State,* 378 Md. 176, 835 A.2d 1103 (2003). We shall hold that the police actions constituted the functional equivalent of interrogation, thereby violating petitioner's rights, and, under the circumstances presented herein, the trial court properly suppressed petitioner's statements.

---

[1] Pursuant to Maryland Code (1973, 2002 Repl.Vol., 2003 Cum.Supp.) § 12-302(c)(3)(i) of the Courts and Judicial Proceedings Article, the State may appeal in the following circumstances:

> "In a case involving a crime of violence as defined in § 14-101 of the Criminal Law Article, and in cases under §§ 5-602 through 5-609 and §§ 5-612 through 5-614 of the Criminal Law Article, the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Constitution of Maryland, or the Maryland Declaration of Rights."

I.

Petitioner was indicted by the Grand Jury for Anne Arundel County for the offenses of first degree murder, second degree murder, and manslaughter, in violation of former Maryland Code (1957, 1996 Repl.Vol., 2001 Cum.Supp.), Article 27 § 407, § 411, and § 387.[2] Straughan Lee Griffin, a resident of Annapolis, was shot and killed in front of his home on September 19, 2002. His assailant[s] shot him in the head, stole his automobile, and ran over his body as they fled from the scene.

Petitioner filed an omnibus pre-trial motion to suppress all evidence seized by the State. We focus here on his motion to suppress his incriminating statements. The Circuit Court held an evidentiary hearing and granted the motion to suppress. We set forth the facts as developed at the suppression hearing.

On October 25, 2002, Terrence Tolbert was arrested in connection with the murder of Straughan Lee Griffin. Tolbert implicated petitioner in the crime. Between 4:30 and 5:00 a.m. on the following day, the Anne Arundel County police arrested petitioner at his home. Petitioner was wearing boxer shorts and a tank top and no shoes. He was handcuffed and transported by uniformed officers to the Annapolis Police Department.

---

[2] Article 27 of Maryland Code (1957, 1996 Repl.Vol., 2001 Cum.Supp.), which was in effect when the events here occurred, has since been repealed and recodified. The provisions relating to first degree murder, second degree murder, and manslaughter are now found in Maryland Code (2002, 2003 Cum.Supp.) § 2-201, § 2-204, and § 2-207 of the Criminal Law Article.

The police took petitioner to a room identified as an "intake room" or "booking room." Detective William Johns, the lead detective, advised petitioner of his rights pursuant to *Miranda v. Arizona*. Petitioner invoked his right to counsel, indicating he did not wish to speak with the police officers without an attorney, and after signing the police advice of rights form, he then was placed in a holding cell at approximately 5:25 a.m.

At 6:00 a.m., Detective Johns, accompanied by uniformed Officer Curtis Reese, went to petitioner's cell and gave him a copy of the arrest warrant and statement of charges.[3] Detective Johns explained the charges to petitioner and told him that they were serious charges, and that he needed to read the document carefully and make sure he understood it.

The statement of charges that Detective Johns gave to petitioner was a District Court of Maryland computer printout listing the charges. The statement of charges indicated that petitioner was charged with first degree murder, second degree murder, armed robbery, armed carjacking, and use of a handgun in a crime of violence. The penalty stated on the document for the offense of first degree murder was, in all capital letters, "DEATH." Petitioner's date of birth, reflected on the statement

---

[3] Md. Rule 4-212(e) requires that a defendant be served with a copy of the statement of charges. The Rule provides, in pertinent part:

> "[A] warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest."

of charges, was June 1, 1985; he was seventeen years of age. As a person under the age of eighteen years at the time of the offense, petitioner was not eligible for the death penalty. *See* Md.Code (2002, 2003 Cum.Supp.) § 2-202(b)(2)(i) (to be death eligible in Maryland, a person must be eighteen years of age or older).

Detective Johns testified that after he handed petitioner the charging document and turned to leave, Officer Reese, apparently having followed Detective Johns to the cell block area, appeared and said, in a tone Detective Johns characterized as loud and confrontational, "I bet you want to talk now, huh!" Detective Johns said that he was surprised by Officer Reese's statement, that it was unexpected, and that Detective Johns said, very loudly within petitioner's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Detective Johns testified that he was concerned that "Officer Reese's outburst would violate Mr. Blake's request for counsel prior to being questioned" and, as a result, he told Officer Reese that petitioner had asked for an attorney and they could not reinitiate any kind of conversation with him.

Petitioner remained in the cell block, wearing only his boxer shorts and t-shirt. Approximately one-half hour after the earlier contact, Detective Johns went back to petitioner's cell to give petitioner his clothing which had been brought to the station by another police officer. Detective Johns opened the exterior door, walked in front of petitioner's cell, and handed him the clothing. Petitioner then said, "I can still talk to you?" Detective Johns responded: "Are you saying that you want to talk to me now?" Petitioner responded "yes." Detective Johns left the cell area and returned after a few minutes. He told petitioner that he would have to read him his rights again and that he would be back in a few minutes. Petitioner then was

taken back to the intake room, was re-advised of his *Miranda* rights, which he waived, and agreed to provide a statement in the absence of an attorney.

Petitioner made certain incriminating statements to Detective Johns as he explained his involvement in the events of September 19, 2002. Detective Johns asked him if he would be willing to take a polygraph exam and petitioner agreed. He was transported to Maryland State Police Barracks J in Annapolis, where Corporal Lloyd E. White again advised petitioner of his *Miranda* rights. After the test was administered, petitioner made further statements.

Petitioner testified at the hearing on the motion to suppress. He testified that he was at home watching television in the early morning hours of October 26, 2002, when he was arrested at approximately 4:30 a.m. Wearing only a tank top, boxer shorts, and no shoes, he was handcuffed and taken outside, where it was cold and wet, and transported to the police station. He was placed in a room and was told by an officer that Terrence Tolbert had identified him as the shooter of Mr. Griffin. He said he wanted a lawyer and was placed in a cell. He said that when Detective Johns and Officer Reese gave him a copy of his charges and Officer Reese made the statement to him, he had just seen that he was facing the death penalty and he was scared. The two officers left, Detective Johns brought him his clothing and then left, and then Detective Johns returned. Petitioner's description of what ensued next differed from that of Detective Johns.[4] Petitioner's version is that the detective initiated the conversation again, stating: "Mr. Blake, do you

[4] The hearing judge accepted Detective Johns's version of events regarding who spoke first after Detective Johns returned.

wish to still talk to me?" In response, petitioner said, "May I still talk to you?" The detective allegedly responded, "Yes." Petitioner denied first asking Detective Johns if he could talk to him.

In response to a question asking petitioner what caused him to speak to Detective Johns after he had invoked his *Miranda* rights, petitioner stated:

> "First, it was what Officer Reese said to me, 'I bet you want to talk now, huh!' I was scared, cold. Never went through nothing like this. And I saw my charges and I saw I was facing death."

The Circuit Court granted petitioner's motion to suppress his statements. Judge Pamela North began by noting that petitioner had invoked his right to counsel and that pursuant to *Miranda*, no further interrogation could ensue. Judge North found the following:

> "The Defendant was still in underwear with no shoes on. During this time, the Defendant made no statements and asked no questions. There was, as of this point, no indication the Defendant would change his mind.
>
> At approximately 6:00 a.m., Detective Johns and Officer Reese, and Officer Reese, by the way, was the same officer who had previously transported the Defendant to the Annapolis Police Department. They both walked back to his cell. As in *Edwards*, Defendant did not request or suggest that the officers should come back to his cell. Defendant was awake. Johns took the statement of charges back to the Defendant, handed them to him, and read the charges to him. Johns testified, and this is a quote, "I said to him, they are serious charges. He needs to read it carefully and make sure

he understood it."

As Johns turned to walk out, Reese said, in a confrontational loud voice, "I bet you want to talk now, huh!" Johns testified he was surprised by this.

* * *

[Detective Johns] also erroneously served him with a document which stated that the penalty for count one murder was death. The word death being written in all capital letters. Defendant was, in fact, not eligible for the death penalty. This was either done intentionally or by mistake.... No matter who was responsible for death being typed in capital letters on the penalty section for murder, it was still State action.

So the next question is was there interrogation? Was there a statement made by the police which the police knew or should have known would be reasonably likely to elicit an incriminating response? That answer has to be yes.

* * *

I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement.

* * *

So the question is how do we know what Reese intended. Well, let's analyze the remark he made. Defendant is handed a statement of charges indicating to him, a seventeen-year-old, indicating to him for the first time that he is being charged with murder and he can get the death

penalty.

Reese's statement was, "I bet you want to talk now, huh!" This is not a vague appeal to Defendant's conscience like the remarks were in *Brewer versus Williams*. First, the statement, itself, suggests he should want to talk. And the word, "now," that is, "I bet you want to talk now" clearly refers Defendant to what has just been handed to him. In other words, look at those charges, look at that penalty, and I'll bet you will want to talk.

* * *

It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is in direct response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement. So, until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them. Since twenty-eight minutes had passed, he asked, "I can still talk to you?" Even though that period of time had passed.

Is there any possible interpretation of that statement that it is, as the State has urged the Court to find, simply an innocent offhanded comment not meant or expected to elicit an incriminating response? I don't think so. Examples of innocent offhanded comments not likely to elicit an incriminating response would be, quote, "Here are some clothing for you." Or, "Please move away from the door so I can unlock it." Or, "Do you need a drink of water?"

United States v. Walker instructs courts to look at the context in which the statement is made. Once again, the context is the statement was made to a seventeen-year-old with no *Miranda* or interrogation experience, who was still in a

chilly cell in his underwear with no shoes on, without a parent present or available, just as he is being handed papers advising him he is charged with murder and can get death.... That statement, under these circumstances, was enough to make an adult repeat offender squirm, not alone a seventeen-year-old.

* * *

Here, Defendant is still in custody, still at the Annapolis police department. Only twenty-eight minutes has gone by since the illegal interrogation. Enough time for him to read the charging document and only one hour and seventeen minutes since he invoked his right to counsel.

He is still seventeen years old. Still undressed. Still in a cold cell, where he is facing death. And an officer had made a case for him to speak now through that officer's coercive statement.

He has no parent present. The Defendant testified that he was scared and cold and thought he was facing death.

* * *

Once Defendant made certain incriminating statements, he was then asked by Detective Johns if he wanted to take a polygraph. This is all one continuous stream of events. There was no break in time or place here. No attenuation.

* * *

The polygraph process began at about 8:30 or 9:00 o'clock with Defendant's mother present at the Maryland State Police Barracks. She signed a consent form but never saw or

spoke to the Defendant. We now have a change of location and the re-Mirandaizing of the Defendant.

However, this is all one continuous course of conduct beginning with Officer Reese's statement and other coercive circumstances. Defendant had, as some cases talk about, already let the cat out of the bag. It is unlikely that an honest seventeen-year-old who is respectful of authority would realize he could turn back now.

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to counsel.

He was thereafter interrogated by police in violation of *Miranda* and *Edwards*. The State must prove his subsequent *pro forma* waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden."

The trial court held that Officer Reese's statement was interrogation and that it violated *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The court granted Blake's motion to suppress as to any and all statements he made at the Annapolis police department and at the Maryland State Police Barracks.

The State noted a timely appeal to the Court of Special Appeals. A divided intermediate appellate court, in an unreported opinion, Bloom, J., dissenting, reversed the judgment. We granted petitioner's writ of certiorari to answer the following question: "Did the police actions in question constitute the functional equivalent of interrogation?" 378 Md.

176, 835 A.2d 1103.

II.

There is no dispute in this case that petitioner was in custody and had invoked his right to counsel. The first question is whether the statement of Officer Reese constituted "police-initiated custodial interrogation" in contravention of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Petitioner argues that Officer Reese's comment, made in conjunction with Detective Johns's passing to petitioner a copy of the statement of charges which incorrectly informed him he was facing the death penalty, was the functional equivalent of interrogation. He maintains that the comment was made specifically for the purpose of getting petitioner to talk and the officer knew or should have known that, under the circumstances, the comment was likely to elicit an incriminating response. Petitioner argues that his subsequent statements were suppressed properly because they were a product of the unlawful police-initiated interrogation which violated *Edwards.*

The State's argument is that Officer Reese's remark to petitioner was not interrogation—that petitioner initiated contact with the police after he read the charging documents and then voluntarily waived his *Miranda* rights before making incriminating statements. The State contends that Officer Reese's remark was not the functional equivalent of interrogation—that it was nothing more than a comment on the seriousness of the charges and, in a sense, a rhetorical question. Even if Officer Reese's remark is viewed as interrogatory or as an invitation to talk, the State maintains that Detective Johns removed any alleged taint from the remark when he

admonished Officer Reese immediately that they could not talk to petitioner because he had invoked his right to counsel.

III.

Our review of the trial court's ruling on a motion to suppress evidence is limited to the record developed at the suppression hearing. *See White v. State,* 374 Md. 232, 249, 821 A.2d 459, 469 (2003). We accept the facts as found by the motions judge unless they are clearly erroneous. *Id.* The evidence is to be viewed in the light most favorable to the prevailing party. *See State v. Rucker,* 374 Md. 199, 207, 821 A.2d 439, 444 (2003). We "undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case." *See White,* 374 Md. at 249, 821 A.2d at 469.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), dictates that when a suspect is taken into custody, the person is entitled to certain procedural safeguards before law enforcement officers may interrogate that person. Those rights include the right to consult with an attorney. *Id.* at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706-07. Once a suspect asks to speak with an attorney, that person may not be interrogated further until either counsel has been made available or until the suspect validly waives the earlier request for an attorney. *Id.* at 444-45, 86 S.Ct. at 1612, 16 L.Ed.2d at 707. *See Edwards,* 451 U.S. at 484-85, 101 S.Ct. at 1885, 68 L.Ed.2d at 386; *Radovsky v. State,* 296 Md. 386, 392-93, 464 A.2d 239, 242-43 (1983) (noting *per se* rule precluding police-initiated interrogation after an arrestee has expressed a desire for the assistance of counsel); *Bryant v. State,* 49 Md.App. 272, 279, 431 A.2d 714, 718 (1981) (stating that "even at the expense of redundancy ... *Miranda* and *Edwards* mean exactly what they say: once the accused requests the presence of counsel at a custodial interrogation, the Fifth

Amendment to the Constitution of the United States of America and Article 22 of the Maryland Declaration of Rights are *ipso facto* invoked, and *all questioning must cease*").

Under the rule developed in *Edwards,* "an accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-85, 101 S.Ct. at 1885, 68 L.Ed.2d at 386. The Supreme Court held that once a suspect has invoked his right to counsel, the police may not make a subsequent attempt to elicit a waiver and then a statement by re-advising him of his *Miranda* rights. A constitutionally valid statement may be obtained by the police in two ways: if the suspect initiates further conversation with the police or if an attorney has been made available to the suspect. *See Smith v. Illinois,* 469 U.S. 91, 94-95, 105 S.Ct. 490, 492-93, 83 L.Ed.2d 488, 493-94 (1984). Following a suspect's request for counsel, a valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated interrogation. *Edwards,* 451 U.S. at 484, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386. *See Radovsky,* 296 Md. at 398-99, 464 A.2d at 246 (holding that after Radovsky had invoked his right to counsel, the police improperly initiated custodial interrogation in violation of *Edwards*). The burden is on the State to prove that, after invoking his or her right to counsel, the accused initiated further discussion with the police. *See State v. Munson,* 594 N.W.2d 128, 141 (Minn.1999) (holding that "the state has the burden of proving that, after invoking his right to counsel, [defendant] initiated further discussion with the police"). If we find that petitioner did not initiate further discussions with the police, following *Edwards,* we do not consider whether he

subsequently waived his right to counsel.[5] *See Oregon v. Bradshaw,* 462 U.S. 1039, 1046, 103 S.Ct. 2830, 2835, 77 L.Ed.2d 405, 413 (1983) (stating that "[s]ince there was no violation of the *Edwards* rule in this case, the next inquiry was 'whether a valid waiver of the right to counsel and the right to silence had occurred'"); *Radovsky,* 296 Md. at 392, 464 A.2d at 242 (holding that "the defendant's right to have counsel during interrogation was violated, under the principles of

---

[5] Some courts have held that a defendant's statements are inadmissible once the police have initiated contact with the defendant in violation of *Edwards,* rendering it unnecessary to inquire whether the defendant validly waived his or her *Miranda* rights. *See, e.g., State v. Munson,* 594 N.W.2d 128, 140 (Minn.1999) (holding that, where officers resumed interrogation before the suspect initiated further conversation, suspect's statements must be excluded and the court need not reach the question of whether suspect's subsequent waiver was voluntary). The Supreme Court has suggested the same. In *Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the Court stated, "*[s]ince there was no violation of the* Edwards *rule in this case,* the next inquiry was 'whether a valid waiver of the right to counsel and the right to silence had occurred.'" *Id.* at 1046, 103 S.Ct. at 2835, 77 L.Ed.2d at 413 (emphasis added). Implicit in this statement is the notion that courts do not engage in a waiver inquiry when it is the police, rather than the suspect, who "initiate" contact. *See also Michigan v. Jackson,* 475 U.S. 625, 636, 106 S.Ct. 1404, 1411, 89 L.Ed.2d 631, 642 (1986) (applying *Edwards* rule to a claimed violation of defendant's Sixth Amendment right to counsel and holding that "if police initiate interrogation after a defendant's assertion ... of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid").

Edwards and *Miranda,* and thus all evidence obtained from Radovsky subsequent to his request for counsel should have been suppressed").

Interrogation means more than direct, explicit questioning and includes the functional equivalent of interrogation. *See Drury v. State,* 368 Md. 331, 793 A.2d 567 (2002). The Supreme Court, in *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), set out the test for establishing when a suspect, who is in custody and has invoked the right to counsel but does not yet have the assistance of counsel, has been subjected to "interrogation." The Court stated:

> "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its *functional equivalent.* That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Id. at 300-01, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 307-08 (emphasis added) (footnotes omitted).

Although the test of whether the police should know their words or actions are reasonably likely to elicit an incriminating response is an objective one, the intent of the police is not irrelevant. *Id.* at 301-02 n. 7, 100 S.Ct. at 1690 n. 7, 64 L.Ed.2d at 308 n. 7. If a police officer acts with a purpose of getting a suspect to talk, it follows that the officer has reason to know that his or her conduct was reasonably likely to elicit an incriminating response. *Id.* at 302 n. 7, 100 S.Ct. at 1690 n. 7, 64 L.Ed.2d at 308 n. 7. We focus on the defendant's perspective

rather than on the police officer's intent. *See Arizona v. Mauro,* 481 U.S. 520, 528, 107 S.Ct. 1931, 1936, 95 L.Ed.2d 458, 467 (1987).

"Interrogation," as used in *Miranda,* has been further explicated in *Innis,* as follows:

> "[T]he term 'interrogation' ... refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."

Innis, 446 U.S. at 301-02, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 308 (citations omitted).

The State maintains that petitioner's rights under *Miranda* and *Edwards* were not violated because the police were presenting petitioner merely with the charging document, a duty they were mandated to perform under Maryland law. The State characterizes Officer Reese's comment as nothing more than a

comment on the seriousness of the charges and as a rhetorical question, concluding that his comment does not constitute interrogation. The answer to this argument depends upon the answer to the question as to whether, under *Innis,* the police officers engaged in activities which they should have known were reasonably likely to elicit an incriminating response. No one disputes here that once petitioner invoked his *Miranda* rights, there was no express questioning.

The Circuit Court found that the comment of Officer Reese amounted to the functional equivalent of interrogation. We agree.

Petitioner clearly and unequivocally invoked his right to counsel under *Miranda.* Thereafter, within a very short period of time, Detective Johns gave petitioner the charging document listing the penalty to which petitioner was subjected as "DEATH." Officer Reese initiated communication with petitioner when he said to him, "I bet you want to talk now, huh!" Whether the remark made by Officer Reese was the functional equivalent of interrogation depends in part on whether the officer's comment was directed towards petitioner and was reasonably likely to elicit a response.

It is undisputed that Officer Reese's comment was directed towards petitioner. The remaining question is whether the comment was reasonably likely to elicit a response. Officer Reese made his comment to petitioner when Detective Johns gave petitioner the charging document advising him that he was subject to the death penalty; any reasonable officer had to know that his comment was reasonably likely to elicit an incriminating response. When the charging document was given to petitioner, containing a false statement of the law with respect to the penalty of death, it was accompanied by an officer's statement which served no legitimate purpose other

than to encourage petitioner to speak. Detective Johns's reaction supports this conclusion. *See United States v. Cooper,* 19 F.3d 1154, 1162 (7th Cir.1994) (stating that "[w]here an objective observer would believe that the encounter was reasonably likely to elicit an incriminating response from the defendant, the court will find that the encounter constituted the 'functional equivalent' of interrogation," citing *Innis,* 446 U.S. at 301, 100 S.Ct. at 1689, 64 L.Ed.2d at 308).

We reject the State's characterization offered at oral argument that the officer's statement was merely a rhetorical question. The officer's statement to petitioner could only be interpreted as designed to induce petitioner to talk and it was improper. This statement was the functional equivalent of interrogation, and it was custodial interrogation. Actions taken by the police that the police should know are reasonably likely to elicit an incriminating response from a suspect amount to the functional equivalent of interrogation.

Merely presenting an accused with a charging document, without more, is not the functional equivalent of interrogation. In Maryland, when a defendant is arrested without a warrant, a copy of the charging document must be served on the defendant promptly after it is filed. Md. Rule 4-212(f). *See White,* 374 Md. at 250-51, 821 A.2d at 469-70; *State v. Conover,* 312 Md. 33, 42, 537 A.2d 1167, 1171 (1988). In the instant case, the officers' conduct does not fall into the category of fulfilling a legal duty and merely serving a charging document upon a defendant. Instead, we have an interrogatory type statement by an officer concomitant with the serving of a document containing the most egregious misstatement as to the penalty for the offense.

The State argues that even if Officer Reese's statement was interrogation, the detective told petitioner that they could not

talk to him, and it was petitioner who reinitiated interrogation, and then knowingly and intelligently waived his *Miranda* rights. The State maintains that if the suspect reinitiates contact with the police, and then waives his rights, police questioning may then commence.

Relying on *Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the State argues that petitioner's question, "Can I still talk to you?", is strong evidence that petitioner initiated the further contact with the police. The State points out that Blake reinitiated contact with the police only after reading the charges, the evidence to support those charges, and specifically, after reading what Terrence Tolbert had to say.

The law is clear that a suspect may validly waive *Miranda* rights, but once the right to counsel has been invoked, additional safeguards are necessary. The Supreme Court pointed out in *Edwards* as follows:

> "[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that *an accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.*"

451 U.S. at 484-85, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386 (emphasis added) (footnote omitted). In *Bradshaw,* the Court found that the accused in fact initiated the conversation and that

there was no violation of the *Edwards* rule. 462 U.S. at 1045-46, 103 S.Ct. at 2835, 77 L.Ed.2d at 412-13. In assessing whether the accused initiated the interrogation, the Court observed that the accused's question, "Well, what is going to happen to me now?", although ambiguous, was, "in the ordinary dictionary sense of that word," initiation. *Id.* at 1045, 103 S.Ct. at 2835, 77 L.Ed.2d at 412. Nonetheless, the Court stated:

> "While we doubt that it would be desirable to build a superstructure of legal refinements around the word 'initiate' in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*.
>
> Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood it is apparent from the fact that he immediately reminded the accused that "[y]ou do not have to talk to me," and only after the accused told him that he "understood' [sic] did they have a generalized conversation. On these facts we

believe that there was not a violation of the *Edwards* rule."

Id. at 1045-46, 103 S.Ct. at 2835, 77 L.Ed.2d at 412-13 (citation omitted). One court concluded that "initiation" by a defendant "occurs when the defendant evinces 'a willingness and a desire for a generalized discussion about the investigation.' " *Holman v. Kemna,* 212 F.3d 413, 417 (8th Cir.2000) (quoting *Bradshaw,* 462 U.S. at 1045-46, 103 S.Ct. at 2835, 77 L.Ed.2d at 412).

In finding that petitioner's question was "in direct response to" Officer Reese's coercive statement, Judge North found that the police reinitiated the contact. The court also found that petitioner "initiated a conversation with [Detective] Johns after he [was] interrogated without counsel twenty-eight minutes earlier." Whether the ultimate issue of "initiation" under *Edwards* is a factual issue requiring a deferential standard of review, *see United States v. Gomez,* 927 F.2d 1530, 1539 n. 9 (11th Cir.1991) (stating that the finding of "initiation" under *Edwards* is considered a factual issue, citing *Fike v. James,* 833 F.2d 1503 (11th Cir.1987)), or a question of law requiring *de novo* review, *see Holman,* 212 F.3d at 417 (holding that issue is legal one requiring *de novo* review, citing *Bannister v. Delo,* 100 F.3d 610, 620 n. 9 (8th Cir.1996); *United States v. Whaley* 13 F.3d 963, 968 (6th Cir.1994)), under either standard of review, we agree with the conclusion of the Circuit Court.

We agree with Judge North that petitioner did not initiate further contact with the police and that the police violated the *Edwards* rule. Although petitioner's question to Detective Johns, "I can still talk to you?" might be considered an "initiation" of contact with the officers in the "dictionary sense" of the word as used in *Bradshaw,* it could hardly be said that, under the circumstances, petitioner initiated the contact as that term is contemplated in the legal sense. Petitioner had

requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected. There was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation. *See Dunkins v. Thigpen,* 854 F.2d 394, 397 (11th Cir.1988) (holding that break in custody after invocation of Fifth Amendment rights ends the need for the *Edwards* rule); *United States v. Walker,* 624 F.Supp. 103, 105 (D.Md.1985) (holding that following defendant's invocation of his *Miranda* rights, delay of approximately one hour not sufficient to constitute waiver of right to have counsel present before he made any statement).

We reject the State's argument that, even if Officer Reese interrogated petitioner in violation of *Miranda* and *Edwards,* Detective Johns somehow cured the violation by declaring in a loud voice: "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Judge North's conclusion that Detective Johns's remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous. The delay of twenty-eight minutes before petitioner asked if he could talk to the officers is insufficient to constitute a waiver of his right to have counsel present before he made any statement. The break in time from Officer Reese's improper interrogation to petitioner's inquiry was very short, indicating that the latter was a continuation of the former.

The record supports the Circuit Court's finding that petitioner's question was in direct response to Officer Reese's unlawful interrogation and was the product of impermissive

interrogation. Under these circumstances, we conclude that petitioner did not "initiate" conversation with the police.

The United States Court of Appeals for the Eleventh Circuit, in *United States v. Gomez*, 927 F.2d 1530 (11th Cir.1991), addressed a similar issue. After Gomez had indicated that he wished to speak with his attorney, DEA agents stated that Gomez should consider cooperating with the government because he faced a possible life sentence and a minimum sentence of ten years. When Gomez asked an agent what he was charged with, he received incorrect information that he was charged with possession of ten kilograms of cocaine. Gomez then expressed his desire to cooperate, was re-advised of his *Miranda* rights, and made incriminating statements. The court held that the agents' comments about the possible benefits of cooperating constituted further interrogation. *Id.* at 1538. The court further noted that, once the police violate *Edwards*, it does not make sense to say that an accused can thereafter "initiate" conversation with the police unless a substantial amount of time has elapsed such that "the coercive effect of the interrogation will have subsided." *Id.* at 1539 n. 8. Although the accused technically may begin a conversation with the police, if this occurs after the police have interrogated the accused in violation of *Edwards*, the voluntariness of such "initiation" is suspect and statements subsequently obtained are inadmissible. *Id.* at 1539. The court noted that "*Edwards* would be rendered meaningless if agents were permitted to continue interrogation after the request for counsel, and then claim that the consequent response by the accused represented initiation and permitted a waiver of the asserted counsel right." *Id.*

We hold that all statements made by petitioner after he invoked his *Miranda* rights are inadmissible and the motion to suppress the statements was properly granted.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AND TO REMAND CASE TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH MARYLAND CODE (1973, 2002 REPL. VOL., 2003 CUM. SUPP.) § 12-302(c)(3)(iv) OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY ANNE ARUNDEL COUNTY.

Supreme Court, U.S.
FILED
JUN 9 - 2005
OFFICE OF THE CLERK

(7)

No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

On Writ of Certiorari To The Court of Appeals of Maryland

BRIEF FOR PETITIONER

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. L[illegible]IC
DIANE E. KELLER
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

QUESTION PRESENTED

When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding in the Court of Appeals of Maryland.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED 1

STATEMENT OF THE CASE 2

A. Circumstances of the Arrest and Statements 2

B. Suppression Court's Ruling 5

C. Appellate Court Proceedings 7

SUMMARY OF ARGUMENT 9

ARGUMENT:

WHEN A POLICE OFFICER IMPROPERLY COMMUNICATES WITH A SUSPECT AFTER INVOCATION OF THE SUSPECT'S RIGHT TO COUNSEL, *EDWARDS* PERMITS CONSIDERATION OF CURATIVE MEASURES BY THE POLICE, OR OTHER INTERVENING CIRCUMSTANCES, TO CONCLUDE THAT A SUSPECT LATER INITIATED COMMUNICATION WITH THE POLICE 11

A. The purpose of *Miranda* and *Edwards* is to prevent police badgering after a suspect invokes his rights, while at the same time allowing a suspect to initiate further communication with the police 12

B. An improper comment by a police officer after a suspect has invoked the right to counsel should not preclude a finding that the suspect has initiated further contact when curative measures, and other intervening circumstances, demonstrate that the police honored the suspect's choice whether to speak without counsel 18

C. Blake's choice whether to speak to the police was honored, and Blake initiated further contact with the police 25

CONCLUSION 32

APPENDIX 1a-4a

Page

TABLE OF AUTHORITIES

Cases:

Arizona v. Roberson, 486 U.S. 675 (1988) ..... 13, passim

Blake v. State, 381 Md. 218 (2004) 1

Brown v. Illinois, 422 U.S. 590 (1975) 20

Connecticut v. Barrett, 479 U.S. 523 (1987) 14, 30

Davis v. United States, 512 U.S. 452 (1994) 15

Dickerson v. United States, 530 U.S. 428 (2000) 14, 20

Edwards v. Arizona, 451 U.S. 477 (1981) ..... i, passim

Holman v. Kemna, 212 F.3d 413 (8th Cir.), *cert. denied*, 531 U.S. 1021 (2000) 27

McNeil v. Wisconsin, 501 U.S. 171 (1991) 16

Malloy v. Hogan, 378 U.S. 1 (1964) 12

Michigan v. Harvey, 494 U.S. 344 (1990) 15

Michigan v. Jackson, 475 U.S. 625 (1986) 15

Michigan v. Mosley, 423 U.S. 96 (1975) ..... 14, passim

Michigan v. Tucker, 417 U.S. 433 (1974) ..... 11, passim

Minnick v. Mississippi, 498 U.S. 146 (1990) .... 15, passim

Miranda v. Arizona, 384 U.S. 436 (1966) ..... 3, passim

Missouri v. Seibert, 124 S.Ct. 2601 (2004) ..... 20, passim

Moran v. Burbine, 475 U.S. 412 (1986) 16, 25

Oregon v. Bradshaw, 462 U.S. 1039 (1983) ..... 8, passim

Oregon v. Elstad, 470 U.S. 298 (1985) ..... 14, passim

Patterson v. Illinois, 487 U.S. 285 (1988) 15

Rhode Island v. Innis, 446 U.S. 291 (1980) ..... 8, passim

Smith v. Illinois, 469 U.S. 91 (1984) 15

Solem v. Stumes, 465 U.S. 638 (1984) 13

Taylor v. Alabama, 457 U.S. 687 (1982) 20

Texas v. Cobb, 532 U.S. 162 (2001) 12

United States v. Calandra, 414 U.S. 338 (1974) 20

United States v. Patane, 124 S.Ct. 2620 (2004) 12, 20

United States v. Washington, 431 U.S. 181 (1977) 16

Constitutional Provisions:

United States Constitution:

Amendment IV 20

Amendment V ..... 1, passim

Amendment XIV ..... 2, passim

Statutes:

28 U.S.C. § 1257 1

Annotated Code of Maryland:

Art. 27, § 412 9

Rule:

Maryland Rules of Procedure:

Rule 4-212 ..... 2, passim

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 381 Md. 218, 849 A.2d 410 (2004). (JA 395-419). The opinion of the Court of Special Appeals of Maryland is unreported. (JA 369-394). The opinion of the Circuit Court for Anne Arundel County, Maryland, granting Blake's suppression motion, is unreported. (JA 344-368).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland was filed on May 12, 2004. The Court of Appeals denied a motion for reconsideration on June 16, 2004. The petition for writ of certiorari was filed within 90 days of the denial of the motion for reconsideration, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Rule 4-212, which provides that the police shall serve a copy of the charging document promptly after the arrest, is reproduced as an appendix to this brief at App. 1a-4a.

STATEMENT OF THE CASE

A. Circumstances of the Arrest and Statements

On September 19, 2002, Straughan Lee Griffin was shot and killed in front of his home in Annapolis, Maryland. (JA 397). His assailants shot him in the head, stole his automobile, and ran over his body as they fled the scene. (JA 397).

Detective William Johns was the lead investigator on the homicide. (JA 14-15). On October 25, 2002, Terrence Tolbert was arrested in connection with the homicide and implicated Blake. (JA 15-16, 340). A warrant for Blake's arrest was issued that same day. (JA 41-42). On the following day, October 26, 2002, the Annapolis police executed the arrest and search warrants at Blake's home. (JA 42, 91). Prior to the arrest, Sergeant Greg Kirchner, Detective Johns's supervisor, (JA 237), instructed all officers present at a briefing not to speak to Blake about the crime should they encounter him at the house. (JA 237-238).

Shortly after 5:00 a.m., the authorities arrested Blake at his home. (JA 15, 238). Blake was transported to the Annapolis Police Department, where Detective Johns advised Blake of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). (JA 16). At 5:11 a.m., Blake indicated that he did not want to talk to the police without an attorney. (JA 19-20, 51; State's Exhibit 1). Accordingly, no further questions were asked of him, and Corporal Hannon placed Blake in a holding cell at the police department at 5:25 a.m. (JA 21, 57).

At 6:00 a.m., Detective Johns went to Blake's cell and handed him a copy of his arrest warrant and statement of charges, explained what the charges were, and told him to read the document carefully. (JA 22-23).[1] Officer Curtis Reese, a uniformed patrol officer who transported Blake to the police station, but otherwise had no role in the investigation, (JA 22, 242), had walked back to the holding cell with Detective Johns. (JA 23). As Detective Johns turned to walk out, Officer Reese said, "I bet you want to talk now, huh?" (JA 23).

Surprised and angry by the unexpected comment, Detective Johns said, very loudly: "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." (JA 23). Detective Johns testified that Blake would have heard his admonition to Officer Reese. (JA 24).

---

[1] Under Maryland Rule 4-212(e), a copy of the warrant and charging document are to be served on a defendant "promptly after the arrest." The statement of charges, and the application for statement of charges, were admitted as State's Exhibit 6 and Defendant's Exhibit A. (JA 88-89). The substance of the statement of charges provided to Blake is reproduced in the Joint Appendix, (JA 329-341), but given the formatting requirements of the appendix, reference to the Exhibits illustrates more accurately what Blake saw when he was provided the statement of charges.

Detective Johns then put his hands in front of him and pushed Officer Reese out of the cell block. (JA 23, 240). Detective Johns testified that he did not want Officer Reese to say anything more that could be heard by Blake and he did not want to hear anything Blake might say. (JA 23-24). The detective then reported the incident to his supervisor, Sergeant Kirchner. (JA 25, 239-240).

Approximately thirty minutes after giving Blake the charging papers, Detective Johns returned to the holding cell to give Blake clothes that had been delivered to the police department. (JA 25).[2] Detective Johns walked to the front of Blake's cell, said, "Here's some clothes for you," and handed the clothes to Blake. (JA 26). As Detective Johns was about to leave the cell, Blake asked, "I can still talk to you?" (JA 26). Detective Johns asked whether Blake was saying that he wanted to talk to Johns. (JA 26). Blake replied, "Yes." (JA 26). Blake returned to the interview room and was advised again of his *Miranda* rights. (JA 28). At 6:40 a.m., he agreed to provide a statement without an attorney. (JA 28; State's Exhibit 2). Blake's demeanor was calm, as it previously had been, (JA 32), and there was no hesitation from Blake about speaking to Detective Johns. (JA 36).

Subsequent to making a statement to Detective Johns, Blake agreed to take a polygraph test, (JA 37; State's Exhibit 3); he appeared to be excited and wanted to take the polygraph. (JA 251). This test was administered at the Maryland State Police barracks by Corporal White, after additional *Miranda* advisements, at approximately 9:15 a.m. (JA 37, 102-104; State's Exhibit 4). Blake was "very eager" to speak with Corporal White. (JA 103). After the administration of the

---

[2] When Blake was arrested, he was wearing a tank top, which Blake described as a muscle shirt with cutoff sleeves, and boxer shorts. (JA 176).

polygraph, Blake gave additional statements. (JA 38, 109).

Blake was 17 years old, with a date of birth of June 1, 1985. (JA 105, 124). He was a junior in high school, and he and his mother believed that he was an intelligent youth. (JA 127). Blake wanted to go to college and become an electrician. (JA 127).

Blake testified at the suppression hearing that he decided to talk to the authorities after hearing Officer Reese's comment and then seeing the charges he was facing, including a possible death penalty. (JA 192). In addition, when he read the complete charges, he saw for the first time that Tolbert said that he shot the victim, took the car keys from the victim's pocket, and ran over the victim while leaving the scene. (JA 215-217). Blake stated that Tolbert was the one who did those things. (JA 217-218). He testified that he felt angry and betrayed, and he wanted the police to know the truth. (JA 218).

Blake's statements were not admitted into evidence at the suppression hearing. The parties agreed, however, that there was evidence from Blake's statement to Detective Johns, and his subsequent statements after the polygraph, that the State desired to use against him at trial. (JA 279).

B. Suppression Court's Ruling

On June 3, 2003, the suppression court issued an oral ruling granting Blake's suppression motion. (JA 344-368). After discussing the case law relevant to statements by a defendant after advisement and invocation of *Miranda* rights, (JA 347-354), the suppression court recounted some of the factual background relating to Blake's arrest pursuant to warrant, noting that Blake was "a 17 year old young man removed by force on a chilly October morning somewhere between 4:30 and 5:00 o'clock in the morning." (JA 354-355). He was "[r]emoved from his home in his underwear with no shoes on," and "taken directly to a police car out front and

driven three to four miles to the Annapolis Police Department." (JA 355). The court continued:

> This 17 year old is of average intelligence. Can read and write. Completed the tenth grade. Had thoughts of going to college and becoming an electrician. And was very polite and cooperative with authority figures.
>
> This 17 year old had been arrested for drug charges on two prior occasions, but had never been advised of Miranda rights or interrogated by police before. He was sober, not on any medication, had used marijuana numerous times in the past, but there was no evidence of any use near the time of his arrest. He indicated he had a sip of alcohol at 9:00 or 10:00 the previous evening.

(JA 355).

The suppression court determined that Blake had been advised of his *Miranda* rights, that he had invoked his right to have counsel present during questioning, and that he signed the advice of rights form at 5:11 a.m. (JA 355-356). The court further found that, until the charging papers were served on him by Detective Johns some fifty minutes later, Blake had not been told of Tolbert's accusations, blaming Blake for the murder. (JA 355-356). The suppression court held that Officer Reese's statement when the charging document was presented, suggesting that Blake would want to talk, constituted interrogation notwithstanding the immediate corrective action by Detective Johns. (JA 357-361). Therefore, the court concluded, Officer Reese's comment constituted a violation of the holdings of *Miranda* and *Edwards*. (JA 361).

The suppression court then considered the impact of Officer Reese's improper remark in addressing the issue of whether Blake's waiver of his right to counsel was knowing and voluntary. (JA 363). Aside from the one remark from Officer Reese, the court found that "there had been no other

threats, physical coercion, or promises made at this point to get the Defendant to talk." (JA 363). The court stated that "[o]nly 28 minutes" elapsed between Officer Reese's remark and Blake's initiation of contact with Detective Johns, and "one hour and 17 minutes since he invoked his right to counsel." (JA 364). The court further found that Blake was "still 17 years old. Still undressed. Still in a cold cell, where he is facing death. And an officer had made a case for him to speak now through that officer's coercive statement." (JA 364). The court recognized that Blake had conceded that, in reading the charging papers, "he learned that Tolbert blamed the murder on him and that he wanted the police to know the truth about these statements[,]" (JA 365), but concluded that "[t]he State has not met its heavy burden of proving a voluntary, knowing, and intelligent waiver or showing that he was not still suffering under the impact of Reese's unlawful course of interrogation." (JA 365).

With respect to the statements made during the course of the polygraph examination, the court found that there was "one continuous course of conduct beginning with Office[r] Reese's statement," and no break in the chain of events to prove attenuation. (JA 366). Accordingly, the court held that the State had failed to establish that Blake's waiver of the right to counsel was not the result of the prior interrogation in violation of *Edwards*, and granted Blake's motion to suppress. (JA 366).

C. Appellate Court Proceedings

The Court of Special Appeals of Maryland reversed. (JA 369-388). The court reviewed both Supreme Court and Maryland case law addressing what does and does not constitute interrogation, (JA 379-387), and concluded that "[t]he comment by Officer Reese was a blurt; viewed objectively it was rhetorical in nature, and there was no actual questioning of appellee." (JA 388). In finding that there was

no interrogation, the court stated:

> The comment was an obvious reference to the evidence in the possession of the police, as reflected in the application for charges. Regardless of what Officer Reese's intent might have been, the totality of the events indicate that appellee was not expected to respond, and he did not respond. There is no evidence that the events were part of a practice by the police designed to elicit incriminating information; it is to the contrary. Appellee was not "badgered" or subjected to "compelling influences" or "psychological ploys."

(JA 388) (citations omitted). Maryland's intermediate appellate court reasoned that "[t]he statement by Officer Reese was not the functional equivalent of actual questioning," but rather "was a reference to the evidence against the person in custody that the police had in their possession." (JA 388). Because the court found that the suppression court's decision rested on a finding that there had been interrogation in violation of *Miranda* and *Edwards*, and not a finding that Blake's statements were otherwise involuntary, (JA 378), the court reversed the order suppressing Blake's statements. (JA 388).

The Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals of Maryland. (JA 395-419). Based on its review of Supreme Court law subsequent to *Rhode Island v. Innis*, 446 U.S. 291 (1980), and *Edwards*, including *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the court held that, pursuant to *Innis*, Officer Reese's comment to Blake after Blake invoked his right to counsel was the functional equivalent of interrogation and not a rhetorical question. (JA 407-413). The court did not believe that the subsequent actions of Detective Johns cured the violation. (JA 417). In assessing whether Blake subsequently initiated further contact, the court looked at various factors, including that Blake was given a statement of charges that indicated that the penalty for first

degree murder was death, although Blake was ineligible for the death penalty because he was a juvenile. (JA 416-417).[3] The court found "no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation." (JA 417). Stating that the record supported the suppression court's finding that Blake's inquiry was in direct response to, and the product of, Officer Reese's unlawful interrogation, the Court of Appeals held that Blake himself did not initiate contact with the police after invoking his *Miranda* rights. (JA 417-418).

SUMMARY OF ARGUMENT

In *Edwards v. Arizona*, this Court created a bright-line rule to protect the Constitutional right against compelled self-incrimination and ensure that a suspect retains the choice whether to talk to the police. This Court held that once an accused invokes his right to counsel, a subsequent waiver of

---

[3] The Maryland Court of Appeals earlier quoted the suppression court as finding that the statement that Blake was subject to the penalty of death, when in fact he was not, "was either done intentionally or by mistake." (JA 402). The court, however, deleted the remaining factual finding of the suppression court that this error was a mistake. (JA 357). Indeed, an affidavit from a commissioner that the State attached to its written memorandum shows that the penalty on the statement of charges is computer generated and the penalty for first degree murder is always listed as "Death." (JA 342; R. 170). A later determination as to the age and mental capacity of a given defendant might make the defendant ultimately ineligible for the death penalty, *see* Md. Code Ann., Art. 27, § 412 (2001 Supp.), as was the case here, but that stage had not yet been reached at the time Blake received the papers.

rights is presumed involuntary if the only showing is that the accused responded to further police-initiated custodial interrogation.

The purpose of the *Edwards* rule is to prevent police badgering after invocation of the right to counsel. Recognizing the value of confessions to the criminal justice system, however, the *Edwards* rule allows for an accused who has invoked his right to counsel to change his mind and initiate further communication. Where the accused initiates further communication, the presumption of an involuntary waiver is inapplicable and the court proceeds to consider the voluntariness of the waiver under the totality of the circumstances.

In determining whether an accused has initiated further contact with the police, the entire course of conduct of the police after invocation of the right to counsel should be considered. A single improper comment by a police officer after a suspect's invocation of the right to counsel should not preclude a finding that the suspect subsequently initiated further contact with the police. Rather, the court should consider all of the circumstances after invocation of the right to counsel to determine if the objectives of *Edwards* are satisfied. Where curative measures and other intervening factors after an improper police comment show that the police honored the suspect's choice whether to speak, and the suspect changed his mind, the suspect should be found to have initiated contact.

In this case, Blake's choice whether to speak to the police was honored, and Blake initiated further contact with the police. Although Officer Reese made an improper comment after Blake invoked his right to counsel, Detective Johns immediately took action that cured the impropriety, terminated any police-initiated interrogation, and left it up to Blake to choose whether he wished to speak without an attorney present. Blake chose to speak with the police after reading in the charging document that Tolbert, his co-defendant, was pinning

the blame for the murder on him. Because Blake initiated further contact, the purpose of *Edwards* was satisfied, and *Edwards*'s presumption of involuntariness is inapplicable.

ARGUMENT

WHEN A POLICE OFFICER IMPROPERLY COMMUNICATES WITH A SUSPECT AFTER INVOCATION OF THE SUSPECT'S RIGHT TO COUNSEL, *EDWARDS* PERMITS CONSIDERATION OF CURATIVE MEASURES BY THE POLICE, OR OTHER INTERVENING CIRCUMSTANCES, TO CONCLUDE THAT A SUSPECT LATER INITIATED COMMUNICATION WITH THE POLICE.

"Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan v. Tucker*, 417 U.S. 433, 446 (1974). In the *Edwards* context, an improper police comment in violation of a suspect's earlier invocation of the right to counsel should not forever preclude a suspect from changing his mind and initiating further communication with the police.[4] Rather, the determination whether an accused initiated communication

---

[4] Although Maryland argued in the state courts that Officer Reese's statement did not constitute interrogation, or the functional equivalent of interrogation, within the meaning of *Rhode Island v. Innis*, 446 U.S. 291 (1980), Maryland did not present that question to this Court and is therefore assuming that it was interrogation.

with the police should be made in a manner that is consistent with the purpose of the rules of *Miranda* and *Edwards*, which "serve to protect a suspect's voluntary choice" whether to speak to the police. *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring). Where, as here, curative measures or intervening circumstances after the initial impropriety show that this purpose was satisfied and that it was the accused's choice to initiate further communication with the police, exclusion of a subsequent voluntary statement is not required by *Edwards*.

A. The purpose of *Miranda* and *Edwards* is to prevent police badgering after a suspect invokes his rights, while at the same time allowing a suspect to initiate further communication with the police.

The Fifth Amendment privilege against self-incrimination, made applicable to the States by the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To that end, this Court has adopted "several prophylactic rules designed to protect the core privilege against self-incrimination." *United States v. Patane*, 124 S.Ct. 2620, 2627 (2004) (plurality opinion).

In *Miranda*, this Court held that, to have an adequate opportunity to exercise the privilege against self-incrimination, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467. Accordingly, the Court adopted a prophylactic rule that requires the police to advise a suspect in custody of various rights, including the right to remain silent and the right to have a lawyer present during questioning. *Id.* at 444. This rule gives "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 441-42.

In *Edwards*, the Court adopted an additional prophylactic rule for cases in which a suspect invokes the right to counsel under *Miranda*. The Court held that when the accused has invoked his right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation." 451 U.S. at 484. Once an accused invokes his right to counsel, police interrogation is permissible only if "the accused himself initiates further communications, exchanges or conversations with the police." *Id.* at 484-85. The "bright-line" *Edwards* rule set forth a "new test" for "when [a waiver of the right to counsel] would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication." *Solem v. Stumes*, 465 U.S. 638, 646 (1984).

The *Edwards* rule raises the presumption that an accused who invokes the right to counsel is unable to respond voluntarily to police-initiated questioning without the advice of counsel. *See Arizona v. Roberson*, 486 U.S. 675, 681-82 (1988) (presumption that waiver after invocation of right to counsel is involuntary applies to police-initiated interrogation in a separate investigation). That presumption, however, is inapplicable when the accused initiates further communication with the police. As this Court clarified in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion), once it is determined that the accused "initiated" further communication, the next inquiry is

> "whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities."

Id. at 1046 (quoting *Edwards*, 451 U.S. at 486 n.9).[5]

Miranda and *Edwards* were not designed to eliminate confessions; the prophylactic rules were enacted to protect the accused's choice whether to speak to the police. The "fundamental purpose" of *Miranda* is "'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.'" *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (quoting *Miranda*, 384 U.S. at 469). The accused must be "free to exercise his own volition" in deciding whether to make a statement to police. *Oregon v. Elstad*, 470 U.S. 298, 308 (1985).

To protect the accused's right to choose, *Miranda* requires procedures that both warn the accused of his right to remain silent and "assure the suspect that the exercise of that right will be honored." *Dickerson v. United States*, 530 U.S. 428, 442 (2000). Thus, in *Michigan v. Mosley*, 423 U.S. 96, 103-07 (1975), where the police "scrupulously honored" Mosley's decision not to speak by terminating questioning upon invocation of his right to remain silent, this Court held that there was no *Miranda* violation when a different officer interrogated Mosley on a different occasion about a different crime.

To be sure, the Court in *Edwards* held that additional

---

[5] The issue before the Court in this case concerns the first step of the analysis, whether Blake initiated further communication with the police. The Maryland Court of Special Appeals, Maryland's intermediate appellate court, found that the suppression court's decision rested on a finding that Officer Reese's comment constituted interrogation in violation of *Miranda* and *Edwards*; it was not a finding that Blake's statements otherwise were involuntary. (JA 378). The Maryland Court of Appeals did not refute that finding.

safeguards are necessary when the accused invokes his right to counsel. The rule prohibiting police-initiated interrogation after invocation of the right to counsel was designed to prevent police from badgering an accused into waiving his *Miranda* rights. *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990). In *Minnick*, the Court held that when counsel is requested, interrogation must cease and the police may not reinitiate interrogation without counsel present, even where the accused has consulted with his attorney. *Id.* at 153. The Court expressed concern with "*persistent attempts* by officials to persuade [the accused] to waive his rights . . . ." *Id.* at 153 (emphasis added). *Accord Davis v. United States*, 512 U.S. 452, 458 (1994) (*Edwards* "'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights'") (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (*Edwards* precludes authorities from badgering or overreaching that might "otherwise wear down the accused and persuade him to incriminate himself"); *Oregon v. Bradshaw*, 462 U.S. at 1044 (*Edwards* is "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was"); *see also Patterson v. Illinois*, 487 U.S. 285, 291 (1988) (the essence of *Edwards* is "[p]reserving the integrity of an accused's choice to communicate with police only through counsel"); *Michigan v. Jackson*, 475 U.S. 625, 635 (1986) (*Edwards* rejected notion that "acquiescence" in police-initiated questioning, after invocation of the right to counsel, could establish a valid waiver).

The facts of *Edwards* demonstrate that the risk of police badgering after a request for counsel was the impetus for the rule. After Edwards was given his *Miranda* warnings and stated that he wanted an attorney, all questioning ceased. *Id.* at 479. The next morning, however, two different officers came to the jail to speak with him. *Id.* The Court highlighted that

"[t]his was not at his suggestion or request." *Id.* at 487. Indeed, Edwards told the detention officer that he did not want to talk to anyone, but the guard told Edwards "he had" to talk. *Id.* at 479. After Edwards was again informed of his *Miranda* rights, he gave a statement. *Id.* Because Edwards did not reinitiate communication with the police, but was told that "he had" to speak with the police after he had invoked his right to counsel, this Court found that the use of Edwards's confession at trial violated his rights under the Fifth and Fourteenth Amendments as construed in *Miranda*. *Id.* at 480.

Although this Court adopted the prophylactic rules in *Miranda* and *Edwards* to ensure that a suspect retains the right to choose whether to remain silent or speak to the police, the Court has never condemned the police practice of obtaining confessions for use at criminal trials. Indeed, this Court repeatedly has recognized the value and desirability of confessions in the criminal justice system. In *Moran v. Burbine*, 475 U.S. 412 (1986), this Court stated that "'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* at 426 (citations omitted). *Accord McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) ("the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *Oregon v. Elstad*, 470 U.S. at 305 ("'far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable . . . .'") (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)); *Michigan v. Tucker*, 417 U.S. at 449 n.23 (voluntary confessions "advance the cause of justice and rehabilitation").

"'[A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police

investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.'" *Edwards*, 451 U.S. at 491 n.1, (Powell, J., concurring) (quoting *Michigan v. Mosley*, 423 U.S. at 102). Indeed, the *Edwards* rule expressly contemplates that the accused, after invoking his right to counsel, retains the choice whether to initiate further communication with the police.

In *Edwards*, the Court underscored that its decision did not "hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel." *Id.* at 485. The Court stressed that "[h]ad Edwards initiated the meeting," nothing would have prevented the police from listening to his volunteered statements and using them against him at trial. *Id. Accord Arizona v. Roberson*, 486 U.S. at 681 (expressing concern with a waiver of the right to counsel that "has come at the authority's behest, and not at the suspect's own instigation").

"It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk." *Edwards*, 451 U.S. at 490 (Powell, J., concurring). There are many reasons why an accused might reconsider his decision whether to speak to the police. For example, an accused might reinitiate conversation if he found out that the case against him was unusually strong, and his cooperation with authorities would result in a reduced charge. *Id.* at 491 (citing *Michigan v. Mosley*, 423 U.S. at 109 n.1 (White, J., concurring in result)). Similarly, as was the case here, an accused may decide that it is in his best interest to give his version of the events after learning that a co-defendant is pinning all the blame on him. Whatever the reason, *Edwards* gives an accused the choice to change his mind and initiate further communication with the police.

B. An improper comment by a police officer after a suspect has invoked the right to counsel should not preclude a finding that a suspect has initiated further contact when curative measures, and other intervening circumstances, demonstrate that the police honored the suspect's choice whether to speak without counsel.

Although the Court was clear in *Edwards* that an accused can initiate further communication with the police after invoking the right to counsel, it did not delineate what constitutes "initiation." Several years later, in *Oregon v. Bradshaw*, 462 U.S. at 1043-46, this Court addressed what constitutes initiation generally. After Bradshaw invoked his right to counsel, and as he was being transported to the jail, he asked, "Well, what is going to happen to me now?" *Id.* at 1042. A plurality of the Court found that this question constituted initiation "in the ordinary dictionary sense of that word." *Id.* at 1045. Although acknowledging that not every statement by a defendant or a police officer would constitute initiation of further conversations, the plurality found that Bradshaw's question "evinced a willingness and a desire for a generalized discussion about the investigation" and was "not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Id.* at 1045-46.

Blake's question to Detective Johns, asking if he could still talk to Johns, certainly "evinced a willingness and a desire" to talk about the investigation; it was an explicit and unequivocal request to talk to the police. The Maryland Court of Appeals recognized that Blake's question constituted initiation in the "dictionary sense." (JA 416). It held, however, that it was not initiation in the "legal sense" because Officer Reese's statement constituted interrogation in violation of *Edwards*, and Blake could not thereafter "initiate" further contact unless there had been a break in custody or a substantial lapse of time sufficient to vitiate the effect of Reese's comment. (JA 416-417).

A single impropriety by the police, however, should not disable an accused from initiating further contact with the police. Rather, the analysis of initiation should focus on the entire course of conduct after invocation of the right to counsel, in light of the objective of *Edwards*. The accused should be found to have initiated contact when curative measures and other intervening circumstances after an improper comment show that the police honored the accused's choice whether to speak and the accused made the choice to speak without counsel.

The rule Maryland proposes is consistent with preserving *Edwards*'s "clear and unequivocal" guidelines, *see Arizona v. Roberson*, 486 U.S. at 682, by maintaining the presumption that a waiver is involuntary if the prosecution shows "only that [the accused] responded to further police-initiated custodial interrogation," *Edwards*, 451 U.S. at 484. Maryland's proposed rule, however, allows consideration of all the circumstances to determine if the presumption is applicable, or whether, under the circumstances, the accused initiated further communication. This approach satisfies the purpose of *Edwards*, while at the same time recognizing the imperfections of police investigation. Mistakes may occur, but they can be cured.

This Court has held, in contexts other than invocation of the right to counsel, that initial improper police conduct is not a per se bar to the admission of a subsequent voluntary statement as long as the purpose of *Miranda* is not thwarted. This Court should similarly hold in the *Edwards* context.

In *Oregon v. Elstad*, 470 U.S. at 300, this Court held that an initial failure of law enforcement officers to give *Miranda* warnings did not, without more, "taint" a subsequent statement "made after a suspect has been fully advised of and has waived his *Miranda* rights." The Court found that the initial impropriety did not render the subsequent statement inadmissible under the "fruit of the poisonous tree" doctrine

used in the Fourth Amendment context. *Id.* at 306-08. Under that doctrine, a confession obtained after an illegal arrest is not admissible at trial unless "'intervening events break the causal connection between the illegal arrest and the confession so that the confession is "sufficiently an act of free will to purge the primary taint."'" *Id.* at 306 (quoting *Taylor v. Alabama*, 457 U.S. 687, 690 (1982), quoting in turn, *Brown v. Illinois*, 422 U.S. 590, 602 (1975)).

The Court noted that "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment . . . ." *Id.* at 306. *Compare United States v. Calandra*, 414 U.S. 338, 348 (1974) (Fourth Amendment exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect") *with Missouri v. Seibert*, 124 S.Ct. 2601, 2616 (2004) (O'Connor, J., dissenting) ("no place for robust deterrence doctrine with regard to violations of *Miranda*"). Accordingly, "the *Miranda* presumption" "does not require that statements and their fruits be disregarded as inherently tainted." *Elstad*, 470 U.S. at 307.[6] The Court in *Elstad* concluded that, because a *Miranda* violation is not itself a constitutional violation, where police obtain an unwarned confession, the admissibility of a subsequent confession does not depend on whether it is the fruit of the first, but on whether it is "knowingly and voluntarily made." *Id.* at 309.

The Court observed in *Elstad* that one potential

---

[6] This Court's decision in *Dickerson*, 530 U.S. at 440, that "*Miranda* is constitutionally based," did not undermine *Elstad*'s holding that a "fruits" analysis is not applicable to a *Miranda* violation. Indeed, the Court's citation to *Elstad*, *id.* at 441, "demonstrates the continuing validity" of the decision, *Patane*, 124 S.Ct. at 2628 (refusal to apply "fruits" analysis to exclude physical fruit of a claimed *Miranda* violation).

explanation why *Miranda* warnings were not initially given is that the task of defining "custody" for purposes of *Miranda* is unfortunately a "slippery one"; as a result, police cannot realistically be expected to make no errors whatsoever regarding when custody existed. *Id.* Therefore, the Court reasoned:

> [I]f errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id. at 309.

The task of determining what constitutes the functional equivalent of interrogation is likewise sometimes a "slippery one." In this case, for example, the suppression court and the Maryland Court of Appeals concluded that Officer Reese's statement was the functional equivalent of interrogation, (JA 357-358, 396), while the majority of Maryland's intermediate appellate court disagreed. (JA 388). Where judges are in disagreement regarding the propriety of a comment after invocation of the right to counsel, it cannot reasonably be expected that police officers will never err. Permitting consideration of curative measures "reflects a balanced and pragmatic approach" to enforcement of the *Edwards* rule. *See Seibert*, 124 S.Ct. at 2614-15 (Kennedy, J., concurring).

In *Elstad*, the Court held that where a police officer improperly obtains a statement that was unwarned but voluntary, the subsequent recitation of *Miranda* warnings

"serves to cure the condition that rendered the unwarned statement inadmissible." 470 U.S. at 311. A contrary ruling "effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver," a result that "comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." *Id.* at 312. The *Miranda* warnings prior to the second statement "ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* at 314. Similarly, in the *Edwards* context, an improper statement by a police officer after invocation of the right to counsel can be cured by subsequent events.

Almost 20 years after *Elstad*, in *Missouri v. Seibert*, 124 S.Ct. at 2605, this Court addressed the situation where, rather than an unintended *Miranda* violation, there was an intentional failure to give *Miranda* warnings, followed by a voluntary statement after administration and waiver of the *Miranda* rights. In determining whether the statement given after *Miranda* warnings was admissible, this Court reaffirmed that the fruit of the poisonous tree analysis was inapplicable. *Id.* at 2610 n.4 (plurality opinion); *id.* at 2616-17 (O'Connor, dissenting). Rather, the plurality stated that the "threshold issue" in a situation where the police questioned first and warned later is whether the warnings in that circumstance could function "effectively," as *Miranda* requires. *Id.* at 2610.

> Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. Thus, in a sequential confession case, the plurality found that the question to be asked is "whether in the circumstances the *Miranda* warnings could reasonably be found effective." *Id.* at n.4. If the answer is yes, the court can then address the issue of voluntariness of the waiver of rights. *Id.*

The plurality in *Seibert* noted that the two interrogations were close in time, conducted by the same officer at the same location, and similar in content. *Id.* at 2612. Moreover, nothing was said "to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the [unwarned] inculpatory statement." *Id.* These circumstances, the plurality found, challenged the "efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 2613.[7] Thus, because the

---

[7] The dissent agreed with the plurality that Seibert's statement could not be excluded under a "fruit of the poisonous tree" theory. 124 S.Ct. at 2616. The dissent noted that the plurality examined "the same facts and circumstances that a 'fruits' analysis would consider (such as the lapse of time between the two interrogations and change of questioner or location)," but explained that it did so for different reasons. *Id.* at 2617. "The fruits analysis would examine those factors because they are relevant to the balance of deterrence value," whereas in the *Miranda* context, the Court "looks to those factors to inform the *psychological* judgment regarding whether the suspect has been informed effectively of her right to remain silent." *Id.* The bases for these approaches are "entirely distinct, and they should not be conflated just because they

warnings could not have served the purpose of *Miranda*, that is, to give the accused the choice whether to speak, the postwarning statements were held inadmissible. *Id.*

In a concurring opinion, Justice Kennedy endorsed an *Elstad*-type analysis which "reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning." *Id.* at 2615. "[N]ot every violation of the [*Miranda*] rule requires suppression of the evidence obtained. Evidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." *Id.* at 2615.

In cases where a two-step interrogation technique was used deliberately to undermine *Miranda*, Justice Kennedy recommended that postwarning statements be excluded "unless curative measures are taken before the postwarning statement is made." *Id.* at 2616.

> Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

Id. Because there was no evidence of curative measures, Justice Kennedy agreed with the plurality that Seibert's statement was inadmissible. *Id.*

An approach similar to that taken in *Elstad* and *Seibert* is appropriate in the context of an alleged *Edwards* violation. In the same way that a simple failure to administer *Miranda* warnings was held not to taint a voluntary and informed waiver

---

function similarly in practice." *Id.*

in *Elstad*, one improper remark by a patrol officer should not preclude an accused from changing his mind and initiating further communication with the police.

The proper inquiry is whether the accused genuinely initiated communication with police, notwithstanding a prior *Edwards* violation. In making that determination, a trial court should look at the entire course of dealings between the police and the suspect after invocation of the right to counsel, including whether the police took curative measures before the suspect spoke to police. *See Seibert*, 124 S.Ct. at 2609-2613 (plurality opinion); *id.* at 2615-16 (Kennedy, J., concurring). Such an approach is consistent with the principle of "free choice" that is the basis for *Miranda* and *Edwards* and furthers the goal of giving the suspect "the power to exert some control over the course of the interrogation." *Moran*, 475 U.S. at 426.

C. Blake's choice whether to speak to the police was honored, and Blake initiated further contact with the police.

This is not a case where the police badgered a defendant into changing his decision to invoke his *Miranda* rights. Rather, a review of all the circumstances, including the curative measures and intervening circumstances that occurred after Officer Reese's improper remark, shows that Blake was aware that he did not have to talk to the police without his attorney, but that he changed his mind and initiated further contact with the police.

Apart from the one comment by a patrol officer, the police acted responsibly and in compliance with this Court's precedent from the outset of the arrest. The police officers initially conducting the search at Blake's home were carefully instructed not to speak with him if he was at home. (JA 237-238). Once at the police station, Detective Johns properly advised Blake of his *Miranda* rights, and when Blake indicated

that he did not want to talk to the police without an attorney, questioning immediately ceased. (JA 16-20, 51). Fifty minutes later, at 6:00 a.m., Detective Johns went to Blake's cell and handed him a copy of the arrest warrant and statement of charges, as required by Maryland law, and told him to read the documents carefully. (JA 22-23).[8] At this point, Officer Reese made the statement, "I bet you want to talk now, huh?" (JA 23).

Maryland does not contest in this Court that Officer Reese's statement was the functional equivalent of interrogation, but argues that the *Edwards* presumption, that Blake could not voluntarily waive his rights and give a statement without an attorney, is inapplicable under the circumstances of this case. The events that occurred after Officer Reese's statement cured the impropriety, terminated any police-initiated communication, and left it up to Blake to determine whether he wanted to initiate further contact, which he did.

Immediately after Officer Reese's statement, Detective Johns, the lead detective in the investigation, (JA 14-15),

---

[8] As indicated *supra*, n.1, Maryland Rule 4-212(e) requires the police to inform the defendant of the nature of the offense charged and to serve a copy of the arrest warrant and statement of charges promptly after the arrest. (App. 3a). The Maryland Court of Appeals correctly held that "presenting an accused with a charging document, without more, is not the functional equivalent of interrogation." (JA 413). *See Rhode Island v. Innis*, 446 U.S. at 301 (statements "normally attendant to arrest and custody" do not constitute "interrogation"); *see also Arizona v. Roberson*, 486 U.S. at 687 (after invocation of right to counsel, police "are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation").

admonished Officer Reese and effectively corrected this improper statement by loudly declaring: "No, he doesn't want to talk to us. He has already asked for a lawyer. We cannot talk to him now." (JA 23). Detective Johns then pushed Officer Reese out of the cellblock. (JA 23, 240). Blake made no statement before the police left his cell. *See Holman v. Kemna*, 212 F.3d 413, 419 (8th Cir.) (significant to finding that there was no *Edwards* violation, despite interrogation after invocation of right to counsel, was accused's failure to make statement before officer left cell, reducing likelihood that he was under compulsion to confess), *cert. denied*, 531 U.S. 1021 (2000).

It was not until approximately a half hour later, when Detective Johns brought him clothes, that Blake asked the question "I can still talk to you?" Blake's question is particularly telling: it shows that he not only felt no compulsion to speak, he was not even sure if he would be allowed to speak.

Significantly, Blake's question came after Blake had read the charging document and learned for the first time that his co-defendant was pinning the blame for the murder on him. (JA 355-356). Blake himself testified at the suppression hearing that, after reading the content of Tolbert's statement, he felt angry and betrayed and he was intent on letting the police know the truth. (JA 215-218).

After Blake asked if he could still talk to Detective Johns, Johns asked Blake if he was saying that he wanted to talk to the police, and Blake answered, "yes." (JA 26). Blake was brought back into the intake room and readvised of his *Miranda* rights, and he signed the form indicating he would speak to the police without an attorney. (JA 27-29; State's Exhibit 2). After Blake gave a statement, Detective Johns asked two questions of Blake: whether Blake at first said he did not want to talk to the police, and whether Blake later changed his mind and asked Johns if he could talk. (JA 33-36; State's Exhibit 5). Blake answered "Yes" to these questions and

signed his initials on the blank line next to the questions, (JA 35), confirming that it was his choice to speak with the police.

This scenario stands in stark contrast to the situation in *Edwards*, where, after Edwards invoked his right to counsel, he was told "he had" to talk with the police. 451 U.S. at 479. Nor was it a situation where, despite an "unequivocal request" during the initial interview that questioning cease until counsel was present, the accused was subsequently told that he "could not refuse" to talk with the police. *See Minnick*, 498 U.S. at 149, 153-54. Rather, Detective Johns's immediate response to Officer Reese's comment clearly conveyed to Blake that the police intended to honor his choice to communicate with them only through counsel. It firmly terminated any police-initiated interrogation and cured the impropriety of Officer Reese's comment.

In finding that Blake did not initiate further contact with the police, (JA 412-413), the Maryland Court of Appeals erred in focusing on factors that were irrelevant to the inquiry regarding initiation. The Maryland court set forth the following facts in finding that Blake did not initiate contact:

> Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected. There was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation.

(JA 416-417).

In relying on these factors, the Court of Appeals conflated the factors relevant to the inquiry regarding initiation with the factors relevant to the separate issues of whether there was

interrogation and whether the waiver was voluntary. For example, that Blake had been given a document misstating that he was subject to the death penalty may have been properly considered by the Maryland court in determining if Officer Reese's comment constituted interrogation. (JA 413). The statement of penalties, however, was not pertinent to the issue of initiation as contemplated in *Edwards*, *i.e.*, whether the police badgered Blake to make a statement or, instead, respected Blake's request to speak only with counsel present.

Likewise, that Blake was 17 years old and in a cold holding cell wearing a muscle shirt and boxer shorts was not relevant to the issue whether Blake initiated further communication with the police. These factors may have been relevant to the ultimate inquiry regarding whether there was a knowing and voluntary waiver of the suspect's *Miranda* rights, which inquiry focuses on the totality of the circumstances, including, in addition to the fact that the accused reopened the dialogue, the background, experience and conduct of the accused. *See Bradshaw*, 462 U.S. at 1046. The appropriate inquiry in the *Edwards* context, however, is whether the accused's subsequent communication was based on police badgering or on the suspect's choice to change his mind about speaking to the police.

An additional error in the Maryland court's analysis is illustrated in its finding that Blake's question was "in direct response" to Officer Reese's comment and "was the product of impermissible interrogation" because there was insufficient attenuation. (JA 417-418). This focus on the existence of a causal connection is inconsistent with this Court's determination that a "fruits" analysis is inappropriate when dealing with a prophylactic rule to protect the Fifth Amendment right against self-incrimination. *See Seibert*, 124 S.Ct. at 2610 n.4 (plurality opinion); *id.* at 2616-17 (O'Connor, J., dissenting); *Elstad*, 470 U.S. at 306-09.

In finding that Detective Johns's actions did not cure the

impropriety in Officer Reese's comment, the court stressed that the time from Officer Reese's comment until Blake's question "was very short, indicating that the latter was a continuation of the former." (JA 417). The court was wrong in its analysis of what constitutes a "cure." Rather than focusing on the elapsed time between Officer Reese's comment and Blake's question, the focus should be on whether Detective Johns's subsequent actions cured the impropriety by making it clear that it was Blake's choice whether to talk to the police, and the police intended to honor that choice. The appropriate inquiry in the *Edwards* context, in determining whether there is a presumption that an accused cannot voluntarily waive his rights, is whether the police badgered the defendant and failed to honor the defendant's invocation of the right to counsel.

As indicated, *supra*, this case did not involve police badgering of the type with which this Court was concerned in *Edwards* and its progeny. Rather, "examin[ing] the surrounding circumstances and the entire course of police conduct with respect to the suspect," *Elstad*, 470 U.S. at 318, demonstrates that Detective Johns took immediate curative measures to negate the impropriety in Officer Reese's statement. The lead detective's response to the patrol officer's comment made it clear to Blake that the police intended to honor his choice whether to talk with the police or remain silent. Indeed, Blake's subsequent question to Detective Johns, asking if he could still talk with the police, confirms that Detective Johns's actions effectively conveyed that message. Thus, the purpose of *Miranda* and *Edwards* was satisfied.

Miranda and *Edwards* give an accused the right to choose between speech and silence, and Blake chose to speak. *See Barrett*, 479 U.S. at 529. Blake's choice to speak to the police was initiation of contact, and the *Edwards* presumption does not apply to his subsequent statements.

The scope of *Miranda* is limited to correcting only "the evils at which it was to strike." *Michigan v. Tucker*, 417 U.S.

at 439-40. Thus, before penalizing police error, the court "must consider whether the sanction serves a valid and useful purpose." *Id.* at 446. The Maryland court's suppression of Blake's statements in this case did nothing to promote the policy interests addressed by *Miranda* and *Edwards*. If the purpose of *Edwards* is to prevent badgering of a suspect who has invoked the *Miranda* right to counsel, then, under the circumstances of this case, that purpose was satisfied.

It does not serve the interests of justice for the State in this case to be deprived of critical evidence because of the offhand, impertinent remark of a patrol officer who walked back to the cell when Detective Johns was bringing Blake the charging document, which remark was immediately dismissed by the detective in Blake's presence. Consideration of the curative measures and intervening circumstances following Officer Reese's remark demonstrates that Blake chose to initiate further communication with the police. Accordingly, *Edwards*'s presumption of involuntariness is inapplicable and does not bar admission of Blake's statements.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the judgment of the Court of Appeals of Maryland be reversed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. LISIC
DIANE E. KELLER

Assistant Attorneys General

Counsel for Petitioner

**Counsel of Record*

June 9, 2005

Rule 4-212. Issuance, service, and execution of summons or warrant.

(a) **General**. When a charging document is filed or a stetted case is rescheduled pursuant to Rule 4-248, a summons or warrant shall be issued in accordance with this Rule. Title 5 of these rules does not apply to the issuance of a summons or warrant.

(b) **Summons — Issuance.** Unless a warrant has been issued, or the defendant is in custody, or the charging document is a citation, a summons shall be issued to the defendant (1) in the District Court, by a judicial officer or the clerk, and (2) in the circuit court, by the clerk. The summons shall advise the defendant to appear in person at the time and place specified or, in the circuit court, to appear or have counsel enter an appearance in writing at or before that time. A copy of the charging document shall be attached to the summons. A court may order the reissuance of a summons.

(c) **Summons — Service.** The summons and charging document shall be served on the defendant by mail or by personal service by a sheriff or other peace officer, as directed (1) by a judicial officer in the District Court, or (2) by the State's Attorney in the circuit court.

(d) **Warrant — Issuance; Inspection.** (1) In the District Court. A judicial officer may, and upon request of the State's Attorney shall, issue a warrant for the arrest of the defendant, other than a corporation, upon a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document and that (A) the defendant has previously failed to respond to a summons that has been personally served or a citation, or (B) there is a substantial likelihood that the defendant will not respond to a summons, or (C) the whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court, or (D) the

defendant is in custody for another offense, or (E) there is probable cause to believe that the defendant poses a danger to another person or to the community. A copy of the charging document shall be attached to the warrant.

(2) In the Circuit Court. Upon the request of the State's Attorney, the court may order issuance of a warrant for the arrest of a defendant, other than a corporation, if an information has been filed against the defendant and the circuit court or the District Court has made a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document or if an indictment has been filed against the defendant; and (A) the defendant has not been processed and released pursuant to Rule 4-216, or (B) the court finds there is a substantial likelihood that the defendant will not respond to a summons. A copy of the charging document shall be attached to the warrant. Unless the court finds that there is a substantial likelihood that the defendant will not respond to a criminal summons, the court shall not order issuance of a warrant for a defendant who has been processed and released pursuant to Rule 4-216 if the circuit court charging document is based on the same alleged acts or transactions. When the defendant has been processed and released pursuant to Rule 4-216, the issuance of a warrant for violation of conditions of release is governed by Rule 4-217.

(3) Inspection of the Warrant and Charging Document. Unless otherwise ordered by the court, files and records of the court pertaining to a warrant issued pursuant to subsection (d)(1) or (d)(2) of this Rule and the charging document upon which the warrant was issued shall not be open to inspection until either (A) the warrant has been served and a return of service has been filed in compliance with section (g) of this Rule or (B) 90 days have elapsed since the warrant was issued. Thereafter, unless sealed pursuant to Rule 4-201(d), the files and records shall be open to inspection.

(e) **Execution of warrant — Defendant not in custody.** Unless the defendant is in custody, a warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest. The defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest or, if the warrant so specifies, before a judicial officer of the circuit court without unnecessary delay and in no event later than the next session of court after the date of arrest. The court shall process the defendant pursuant to Rule 4-216 and may make provision for the appearance or waiver of counsel pursuant to Rule 4-215.

(f) **Procedure — When defendant in custody.** (1) Same Offense. When a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest. When a charging document is filed in the District Court for the offense for which the defendant is already in custody a warrant or summons need not issue. A copy of the charging document shall be served on the defendant promptly after it is filed, and a return shall be made as for a warrant. When a charging document is filed in the circuit court for an offense for which the defendant is already in custody, a warrant issued pursuant to subsection (d)(2) of this Rule may be lodged as a detainer for the continued detention of the defendant under the jurisdiction of the court in which the charging document is filed. Unless otherwise ordered pursuant to Rule 4-216, the defendant remains subject to conditions of pretrial release imposed by the District Court.

(2) Other Offense. A warrant issued pursuant to section (d) of this Rule for the arrest of a defendant in custody

for another offense may be lodged as a detainer for the continued detention of the defendant for the offense charged in the charging document. When the defendant is served with a copy of the charging document and warrant, the defendant shall be taken before a judicial officer of the District Court, or of the circuit court if the warrant so specifies, without unnecessary delay. In the District Court the defendant's appearance shall be no later than 24 hours after service of the warrant, and in the circuit court it shall be no later than the next session of court after the date of service of the warrant.

(g) **Return of Service.** The officer who served the defendant with the summons or warrant and the charging document shall make a prompt return of service to the court that shows the date, time, and place of service.

(h) **Citation — Service.** The person issuing a citation, other than for a parking violation, shall serve it upon the defendant at the time of its issuance.

Supreme Court, U.S.
FILED
JUN 9 - 2005
OFFICE OF THE CLERK

No. 04-373

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF OF TEXAS, DELAWARE, THE DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, MICHIGAN, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

GREG ABBOTT
Attorney General of Texas
BARRY R. McBEE
First Assistant Attorney General
R. TED CRUZ
Solicitor General
DON CLEMMER
Deputy Attorney General
For Criminal Justice

*Counsel of Record

GENA BUNN
Chief, Postconviction
Litigation Division
* EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division
FREDERICKA SARGENT
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400

ATTORNEYS FOR *AMICI CURIAE*

M. JANE BRADY
Attorney General of Delaware
Department of Justice
820 N. French St.
Wilmington, Delaware 19801

ROBERT J. SPAGNOLETTI
Attorney General for the District of Columbia
John A. Wilson Building
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004

CHARLES J. CRIST, JR.
Attorney General of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1050

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

LAWRENCE G. WASDEN
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

LISA MADIGAN
Attorney General of Illinois
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601

JIM PETRO
Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, Oklahoma 73105-4894

State of Oregon
HARDY MYERS
Attorney General
1162 Court St. N.E.
Salem, Oregon 97301

MICHAEL A. COX
Michigan Attorney General
P.O. Box 30212
Lansing, Michigan 48909

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

HENRY D. McMASTER
Attorney General of South Carolina
Rembert C. Dennis Office Building
P.O. Box 11549
Columbia, South Carolina 29211-1549

LAWRENCE E. LONG
Attorney General of South Dakota
500 East Capitol Ave.
Pierre, South Dakota 57501-5070

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah 84114-2320

WILLIAM SORRELL
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05602

QUESTION PRESENTED

When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. Neither *Edwards* Nor the Fifth Amendment Are Implicated When a Suspect Voluntarily Reinitiates Contact with Police Officers.	3
II. The Policy-Based Reasoning of *Edwards* and *Miranda* Does Not Support the Lower Court's Overly Technical Holding That Blake's Initiation Was Part of a Continuous Course of Police Misconduct.	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	**Page**
Arizona v. Mauro, 481 U.S. 520 (1987)	4
Arizona v. Roberson, 486 U.S. 675 (1988)	4
Blake v. State, 849 A.2d 410 (Md. 2004)	5,7
Edwards v. Arizona, 451 U.S. 477 (1981)	*passim*
Frazier v. Cupp, 394 U.S. 731 (1969)	7
Henderson v. Singletary, 968 F.2d 1070 (11th Cir. 1992)	8
Holman v. Kemna, 212 F.3d 413 (8th Cir. 2000)	8
Michigan v. Tucker, 417 U.S. 433 (1974)	7
Miranda v. Arizona, 384 U.S. 436 (1966)	*passim*
Missouri v. Seibert, 124 S. Ct. 2601(2004)	6,7
Moore v. Dugger, 856 F.2d 129 (11th Cir. 1988)	8
Oregon v. Bradshaw, 462 U.S. 1039 (1983)	3-4,6,9
Oregon v. Elstad, 470 U.S. 298 (1985)	*passim*
Rhode Island v. Innis, 446 U.S. 291 (1980)	4
United States v. Velasquez, 885 F.2d 1076 (3d Cir. 1989)	9
Constitutions	
U. S. Const., amend. V	*passim*

INTEREST OF *AMICI CURIAE*

Amici States have a substantial interest in ensuring the validity of convictions and sentences lawfully obtained through competent and non-coercive police investigation tactics. States also have an interest in providing clear guidance to state law enforcement officials for conducting such investigations. A prophylactic rule such as *Edwards v. Arizona*[1] cannot reasonably turn on unanticipated acts or statements without regard to good faith attempts to honor an invocation of counsel and to correct any missteps by investigators. If the Maryland court's interpretation of *Edwards* is allowed to stand, then the policy interests embodied in *Edwards, i.e.,* deterring police coercion and the taking of unreliable confessions, would be sacrificed for rigid but meaningless standards that benefit savvy criminals but denigrate curative efforts by conscientious officers attempting to scrupulously honor the law in complicated circumstances. Given the significant number of variables involved in even the most routine of criminal arrests, investigations, and prosecutions, arbitrary enforcement of such rules does more harm to the public than good because it may set otherwise guilty criminals free while failing to protect the very interests it was designed to. Thus, the Attorney General of Texas, and the attorneys general of *amici* States, have a significant stake in this Court's resolution of the Question Presented.

SUMMARY OF THE ARGUMENT

Blake was arrested during the investigation of a brutal carjacking and homicide: After he was transported to police headquarters in Annapolis, Maryland, Blake invoked his right to counsel. Blake was immediately placed in a holding cell and no further questions were asked of him. Less than an hour later, Detective Johns stopped by Blake's cell, tendered a copy of the charging documents, and instructed him to read them carefully. As Detective Johns was leaving, Officer Reese, a uniformed patrol officer uninvolved with the investigation, said "I bet you want to talk now, huh." A surprised Detective Johns stated loudly, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Detective

---

[1] 451 U.S. 477 (1981).

Johns then escorted Officer Reese out of the area.

Approximately thirty minutes later, Detective Johns returned to provide Blake with clothing. As Detective Johns was about to leave, Blake asked, "I can still talk with you?" Detective Johns clarified that Blake wanted to talk to detectives, then returned Blake to the interview where he was read his rights and agreed to provide a statement without an attorney.

The record makes it clear that Blake reinitiated contact with police after first invoking his right to counsel, evincing a willingness and a desire to speak with Detective Johns. Thus, the Fifth Amendment rule of *Edwards* was not implicated and Blake's confession was admissible. The lower court erred when it ignored the curative measures taken by Detective Johns and treated the entire sequence of events as a single episode of police questioning. This Court's jurisprudence in the context of *Miranda v. Arizona*[2] makes it clear that, in the absence of deliberately coercive police investigation tactics, a court should not disregard good faith efforts by officers to honor a suspect's invocation of the right to counsel.

Consequently, the Attorney General of Texas, and the attorneys general of *amici* States, respectfully suggest that the lower court's interpretation of *Edwards* was in error and should be overturned. Further, *amici* States believe that this Court should resolve this novel dilemma — that is all but certain to recur — in favor of the State of Maryland.

ARGUMENT

In *Edwards v. Arizona*, this Court created a "bright line" rule concerning the Fifth Amendment right to counsel in order to "lend [] substance" to its holding in *Miranda*:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if

[2] 384 U.S. 436 (1966).

> he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, *unless the accused himself reinitiates further communication, exchanges, or conversations with the police.*

451 U.S. 477, 484-85 (1981) (footnote omitted, emphasis added).

I. Neither *Edwards* Nor the Fifth Amendment Are Implicated When a Suspect Voluntarily Reinitiates Contact with Police Officers.

The facts of *Edwards* illustrate the rationale behind its rule. The same day Edwards was arrested, he was informed of his *Miranda* rights and questioned about his involvement in a murder. 451 U.S. at 478. Edwards initially submitted to interrogation, but questioning was ceased when he requested counsel. *Id.* at 479. Early the next morning, Edwards was told that detectives wished to speak with him again. *Id.* Edwards replied that he did not want to talk, but was told that he was required to submit to further questioning. *Id.* Although Edwards was once again given *Miranda* warnings, he proceeded to implicate himself in the murder. *Id.* The Court noted that "had Edwards initiated the meeting," the Fifth Amendment would not render his confession inadmissible. *Id.* at 485. However, because Edwards was subjected to further custodial interrogation *against his will*, his incriminating statement was excluded. *Id.* at 487. Thus, much as with *Miranda*, the focus of *Edwards* was on the overbearing and intimidating tactics of state actors in continuing to interrogate Edwards, despite his unequivocal invocation of his right to counsel and the implied desire to communicate with police through counsel *only*.

A proper initiation obviates the Fifth Amendment concerns of *Edwards*, *i.e.*, that a subsequent waiver of the right to counsel was the result of overwhelming or undue influence by law enforcement officials. In *Oregon v. Bradshaw*, a plurality of the Court explained that the *Edwards* rule "was in effect a prophylactic rule, designed to protect an accused in police custody from being *badgered* by police officers in the

manner in which the defendant in *Edwards* was."[3] 462 U.S. 1039, 1044 (1983) (emphasis added). In *Bradshaw*, the defendant initially invoked his right to counsel, but then "evinced a willingness and a desire for a generalized discussion about the investigation" by asking, "Well, what is going to happen to me now?" *Id.* at 1042-43, 1045-46. As a result, a subsequent polygraph examination and confession did not amount to a violation of the *Edwards* rule because the suspect freely reinitiated contact with law enforcement. *Id.* at 1042, 1046. Hence, it is without question that the Fifth Amendment is not implicated and a confession is admissible, even when the right to counsel was previously invoked, when a suspect reinitiates contact with law enforcement and subsequently waives his right to counsel.

Here, it is plain that Blake voluntarily reinitiated contact with police after invoking his right to counsel when he queried Detective Johns, "I can still talk to you?" In fact, Blake had every reason to do so: he stood accused of a serious crime and he felt angry and betrayed by his co-defendant's accusation that Blake was primarily responsible. There is no doubt under *Bradshaw* that Blake's remark "evinced a willingness and a desire" to speak with Detective Johns, in order to clarify his relative culpability in the crime, and no Fifth Amendment violation occurred thereby. However, the novel issue before the Court — novel in the *Edwards* context — is whether Officer Reese's earlier, aborted attempt to speak to Blake tainted his subsequent *Bradshaw* initiation.

The Maryland court certainly believed so. In fact, the lower court determined that Officer Reese's statement was the beginning of

---

[3] Similarly, in *Arizona v. Mauro*, this Court held that inculpatory statements made by a suspect to his wife in the presence of a police officer did not violate *Edwards* even though the suspect had previously invoked his right to counsel. *Mauro*, 481 U.S. 520, 522-23, 530 (1987). In so holding, the Court noted that Mauro's incriminating statements were not elicited by police conduct but by his wife. *Id.* at 527. Moreover, the statements were not the result of a ruse or psychological ploy perpetrated to "subjugate the individual to the will of his examiner." *Id.* at 526-29 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980), and *Miranda*, 384 U.S. at 457). Therefore, the Fifth Amendment was not implicated because the statements were not the result of a police-dominated, coercive environment. *Id.* at 529-30. The policy underlying the *Edwards* rule is simply not applicable where a defendant is able to act voluntarily and is not subject to the "inherently compelling pressures" of investigative interrogation. *Arizona v. Roberson*, 486 U.S. 675, 681 (1988).

"one continuous course of conduct" designed to overbear Blake's will and coerce a confession from him. *Blake v. State*, 849 A.2d 410, 416 (Md. 2004). Thus, Blake's initiation was not a initiation at all but merely a "direct response" to Officer's Reese's earlier question, "I bet you want to talk now, huh," because "[t]here was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect" of Reese's statement. *Id.* at 422. Apparently, neither a twenty-eight minute break between Officer's Reese's comment and Blake's question, nor Detective John's efforts to remedy the situation by instructing Reese that Blake had invoked his right to counsel and removing him from the area achieved adequate attenuation. *Id.* Yet, as shown *infra*, the lower court's reasoning is at odds with this Court's established Fifth Amendment jurisprudence and should be reversed. This is because *Edwards*, like *Miranda*, seeks to deter improper police conduct and assure trustworthy evidence, not hold law enforcement to an unrealistic standard of perfection. The state court's decision does not serve the policy goals of *Edwards*.

II. The Policy-Based Reasoning of *Edwards* and *Miranda* Does Not Support the Lower Court's Overly Technical Holding That Blake's Initiation Was Part of a Continuous Course of Police Misconduct.

In the *Miranda* context, this Court's clear focus on discouraging coercive tactics is illustrated in *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, police executed an arrest warrant at the home of a burglary suspect. *Id.* at 300. While the arresting officer detained the suspect momentarily so another officer could explain to the suspect's mother what was happening, the suspect admitted involvement in the burglary. *Id.* at 301. The suspect was promptly transported to headquarters and advised of his *Miranda* rights, which he waived, and then gave a formal confession. *Id* The issue before the Court was whether the initial failure to administer *Miranda* warnings so tainted the subsequent confession to render it inadmissible as well. *Id.* at 300. Ultimately, the Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* at 318.

The Court first noted that neither *Miranda* nor the Fifth Amendment were concerned with "moral and psychological pressures

to confess emanating from sources other than official coercion." *Elstad,* 470 U.S. at 304-05. Rather, they advanced the goals of deterring improper police conduct and ensuring trustworthy evidence. *Id.* at 308. Thus, it was not within the scope of *Miranda* to hold that a failure to administer warnings — unaccompanied by any actual coercion or circumstances purposefully calculated to undermine free will — taints the investigatory process so that a subsequent waiver and confession would be inadmissible. *Id.* at 309, 313. To do so would severely handicap legitimate law enforcement activity but would do little to protect the individual's constitutional right against compelled testimony. *Id.* at 312. The proper role of a court is to "examine the surrounding circumstances and the entire course of police conduct with respect to the suspect" with an eye for deliberate coercion. *Id.* at 318. Moreover, in so doing, courts should engage in more substantive inquiries than "who said what first." *Bradshaw,* 462 U.S. at 1050 (Powell, J., concurring). Clearly, both *Miranda* and *Edwards* were designed to effect the same end.

The instant case does not present a situation where Blake was forced to speak with law enforcement or to waive his right to counsel against his will, under police pressure. Indeed, Maryland law enforcement scrupulously honored Blake's *Miranda* and *Edwards* rights from the instant of his arrest. But for a single, unanticipated comment by an officer unconnected to the investigation, there was no attempt to undermine Blake's free will. In contrast, this Court recently considered a deliberate scheme to do just that by placing a suspect in a *Miranda* catch-22. In *Missouri v. Seibert,* the defendant was subjected to a two-step protocol, *i.e.,* the suspect was purposefully given no *Miranda* warnings until she confessed, then was warned and asked to repeat her statement for the record. 124 S. Ct. 2601, 2605-06 (2004) (plurality opinion). This two-step process was deliberate: officers were trained to employ it. *Id.* at 2608-09. As the Court explained:

> the reason that [the two-step process] is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble.

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.

Id. at 2610-11. This is, without a doubt, a strategy to thwart *Miranda* and subvert the suspect's free will and, as a result, violates the Fifth Amendment. *Id.* at 2612-13.

The interplay of *Elstad* and *Seibert* illustrates the policy interests inherent in both *Miranda* and *Edwards*: the Fifth Amendment must not be compromised by clever police tricks, constant badgering, or a coercive atmosphere. Blake was subjected to none of these elements. There was no effort to induce a confession through unwholesome means. Blake was not harassed by detectives soliciting a waiver of his previous invocation of counsel.[4] Instead, detectives scrupulously honored that invocation save for a single, spontaneous comment by Officer Reese, which went unanswered. It cannot be credibly argued that Reese's conduct was planned or sanctioned by Detective Johns or any member of the investigating authority. It is surprising that the court below disregarded the honorable and nearly flawless police conduct in the instant case, focusing instead on Officer Reese's random statement, which was quickly corrected by Detective Johns. As this Court has noted, the law "cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan v. Tucker,* 417 U.S. 433, 446 (1974). Rather, the law should fully endorse and encourage curative efforts by officers attempting to correct a momentary mistake. The state court's conclusion is clearly at odds with *Edwards* and *Miranda* in this respect.

Other courts have taken a policy-based approach similar to

---

[4] The lower court makes much of the fact that the charging documents provided to Blake incorrectly informed him that he was eligible for the death penalty. *Blake v. State,* 849 A.2d at 413-16, 420, 422. However, this Court has rejected the notion that such a falsehood — even a deliberate lie to a suspect — is impermissibly coercive. *Frazier v. Cupp,* 394 U.S. 731, 739 (1969). Additionally, this mistake can only reasonably be viewed as a minor psychological pressure amongst many. This Court has held that such factors are not controlling. *Elstad,* 470 U.S. at 304-05.

Elstad in this regard. For example, in *Holman v. Kemna,* sheriff's deputy Wright visited Holman after he had invoked the right to counsel, ostensibly to deliver information that his girlfriend had implicated him in a murder. 212 F.3d 413, 416 (8th Cir. 2000). The next day, Holman asked Wright to return and take his confession. *Id.* At issue, then, was whether the earlier visit — initiated by law enforcement — tainted Holman's subsequent statement. *Id.* at 417. The court of appeals found that, importantly, "when Wright left Holman's cell [the first] night, Holman had not made any statement, thus reducing the likelihood that he was under any compulsion to confess" the next day. *Id.* at 419. As a result, the court held that the policy of *Edwards* was not violated because there was no police overreaching. *Id.* at 419-20. The Eight Circuit's focus on the absence of coercion is in line with *Edwards* and clearly illustrates the error in the lower court's overly technical approach. Moreover, the facts of this case track *Holman* closely. Because Blake did not respond to Officer Reese's improper comment, and most likely heeded Detective Johns's subsequent effort to attenuate any taint, it is doubtful that Blake's later initiation was compelled in any way.

Similarly, in *Henderson v. Singletary,* the Eleventh Circuit held that, when addressing an *Edwards* initiation issue, a court should not employ an overly-technical analysis of elapsed time or a sequence of events, but "must instead satisfy themselves that the defendant-initiated confession was not the product of improper police questioning or pressure." 968 F.2d 1070, 1074 (11th Cir. 1992) (opinion on r'hrg). The particular amount of time between an improper communication and an initiation is less important than the opportunity for rational reflection on the choice before the suspect, to ensure the decision is not the result of police badgering and was not clouded by improper threats or promises. *Id.*; *see also Moore v. Dugger,* 856 F.2d 129, 133 (11th Cir. 1988) (holding that "[i]f a suspect clearly, of his own volition, changes his mind about wanting counsel, we see nothing ... to require that the withdrawn request for counsel continue in force"). In the instant case, despite the twenty-eight minute interval between Officer Reese's

comment and Blake's initiation,[5] it is doubtful that either Officer Reese's statement or any police conduct would have spurred any suspect's decision to speak with detectives. Instead, it is far more reasonable to acknowledge that Blake's desire to exculpate himself following his co-defendant's accusations motivated his actions. Thus, the court below was necessarily out of line with the intent of *Edwards* and *Elstad* when it found a Fifth Amendment violation in the absence of overt coercion.

The heart of *Miranda* and *Edwards* has always been deterring police misconduct and ensuring the voluntariness a suspect's confession. These are the ultimate concerns. Secondary to these policy interests is the desire for a bright-line rule. But such a rule must not be allowed to undercut these core policy concerns and render them mere words on paper. Indeed, the bright-line rule of *Edwards* is that interrogation must cease when a suspect asks for a lawyer. This is exactly what happened in the instant case. In fact, but for a rogue police officer's unanswered question, there is no evidence in the record that Blake did not voluntarily and willingly reinitiate contact with Detective Johns without coercion or undue influence of any kind. Overly technical analyses and murky, circumstantial reasoning such as that employed by the lower court bring more confusion to the *Edwards* arena. This Court should clarify and reaffirm that, absent coercive police tactics, an initiation of contact by a suspect is valid under *Edwards* and *Bradshaw* as long as that initiation demonstrates a willingness and a desire for further discussion with law enforcement authorities.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

---

[5] Even if a time-elapsed approach is taken, the Third Circuit has found that a thirty minute interval between an invocation and a reinitiation does not run afoul of *Edwards*. *United States v. Velasquez,* 885 F.2d 1076, 1085-86 (3d Cir. 1989).

BARRY R. McBEE
First Assistant Attorney General

R. TED CRUZ
Solicitor General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

*EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

FREDERICKA SARGENT
Assistant Attorney General

* Counsel of Record

P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: elm@oag.state.tx.us

ATTORNEYS FOR *AMICI CURIAE*

MOTION FILED
JUN 10 2005

No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

vs.

LEEANDER JEROME BLAKE,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTION PRESENTED

Does the rule of *Elstad* v. *Oregon* apply to an alleged violation of *Edwards* v. *Arizona*?

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

vs.

LEEANDER JEROME BLAKE,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation* respectfully moves for leave to file a brief *amicus curiae* out of time, and to file the accompanying brief *amicus curiae* in support of the petitioner.

Amicus regrets missing the deadline for filing. *Amicus* was prepared to file the brief on time for the original deadline for filing June 2, 2005. Upon finding out that this Court had extended the time for filing, *amicus* chose to further review the brief. Counsel of record did not update the calendering of the due date for filing the brief, causing it to be picked up from the printer one day late. Counsel of record apologizes for this failure. *Amicus* seeks leave to file its brief one day after the

---

* This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

June 9, 2005 deadline.** Counsel for both parties have consented to filing the brief.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves *Edwards* v. *Arizona*, 451 U. S. 477 (1981), an extension of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Edwards* operates at the outer edge of the Fifth Amendment, suppressing both voluntary waivers and voluntary confessions. Applying the rule of *Oregon* v. *Elstad*, 470 U. S. 298 (1985) will ameliorate some of *Edwards*' harsh consequences to public safety without undermining its protection of the *Miranda* rule. The Maryland Court of Appeals' refusal to apply *Elstad* to *Edwards* needlessly increases *Edwards*' cost to society. Applying *Elstad* to *Edwards* will result in the admission of voluntary confessions which will lead to the conviction of more guilty criminals, which advances the public safety interests that the CJLF was formed to protect.

June, 2005

Respectfully submitted,

CHARLES L. HOBSON
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

** This motion includes an interest of *amicus curiae*, as does the brief. Since deleting the interest of *amicus curiae* from the brief would require its reprinting, *amicus* has chosen to leave it in the brief in order to avoid further delay.

TABLE OF CONTENTS

Question presented i

Motion for leave to file brief *amicus curiae* out of time .. iii

Interest of *amicus curiae* iv

Table of authorities vi

Brief *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 7

I

As a prophylactic rule for *Miranda*'s prophylactic rule, expanding *Edwards* should be more difficult than expanding *Miranda* 7

II

The rule of *Oregon* v. *Elstad* can apply to a violation of *Edwards* v. *Arizona* 11

A. *Elstad* 12

B. *Elstad* and *Edwards* 16

III

Blake's *Miranda* waiver was knowing and voluntary 21

Conclusion 24

TABLE OF AUTHORITIES

Cases

Adams v. United States ex rel. McCann, 317 U. S. 269, 87 L. Ed. 268, 63 S. Ct. 236 (1942) 18

Arizona v. Roberson, 486 U. S. 675, 100 L. Ed. 2d 704, 108 S. Ct. 2093 (1988) 16, 17, 20

Berkemer v. McCarty, 468 U. S. 420, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) 9

Blake v. State, 849 A. 2d 410 (Md. 2004) 2, 3, 4, 5, 24

Chavez v. Martinez, 538 U. S. 760, 155 L. Ed. 2d 984, 123 S. Ct. 1994 (2003) 8, 10

Christopher v. Florida, 824 F. 2d 836 (CA11 1987) 20

Colorado v. Spring, 479 U. S. 564, 93 L. Ed. 2d 954, 107 S. Ct. 851 (1987) 23

Davis v. United States, 512 U. S. 452, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994) 10, 11, 18

Dickerson v. United States, 530 U. S. 428, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000) 7, 8, 9, 15

Douglas v. Jeannette, 319 U. S. 157, 87 L. Ed. 1324, 63 S. Ct. 877 (1943) 10

Edwards v. Arizona, 451 U. S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981) 1, 4, 7, 10, 11, 17, 18, 19, 21

Harris v. New York, 401 U. S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971) 8, 13

Haynes v. Washington, 373 U. S. 503, 10 L. Ed. 2d 513, 83 S. Ct. 1336 (1963) 9

McNeil v. Wisconsin, 501 U. S. 171, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991) 7, 10, 20

Michigan v. Harvey, 494 U. S. 344, 108 L. Ed. 2d 293, 110 S. Ct. 1176 (1990) 7, 10, 16, 17, 18

Michigan v. Tucker, 417 U. S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974) 7, 13, 14

Minnick v. Mississippi, 498 U. S. 146, 112 L. Ed. 2d 489, 111 S. Ct. 486 (1990) 16

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) 1, 2, 4, 7, 9, 11, 16, 21, 22, 23

Missouri v. Seibert, 542 U. S. __, 159 L. Ed. 2d 643, 124 S. Ct. 2601 (2004) 16

Moran v. Burbine, 475 U. S. 412, 89 L. Ed. 2d 410, 106 S. Ct. 1135 (1986) 9, 10, 20, 23, 24

New York v. Quarles, 467 U. S. 649, 81 L. Ed. 2d 550, 104 S. Ct. 2626 (1984) 7, 8

Oregon v. Bradshaw, 462 U. S. 1039, 77 L. Ed. 2d 405, 103 S. Ct. 2830 (1983) 19

Oregon v. Elstad, 470 U. S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985) ..... Passim

Solem v. Stumes, 465 U. S. 638, 79 L. Ed. 2d 579, 104 S. Ct. 1338 (1984) 16

Taylor v. Alabama, 457 U. S. 687, 73 L. Ed. 2d 314, 102 S. Ct. 2664 (1982) 19

United States v. Patane, 542 U. S. __, 159 L. Ed. 2d 667, 124 S. Ct. 2620 (2004) 7, 8, 15

Withrow v. Williams, 507 U. S. 680, 123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993) 9

Wong Sun v. United States, 371 U. S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963) 13, 20

Miscellaneous

Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417 (1985) 9

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

vs.

LEEANDER JEROME BLAKE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves *Edwards* v. *Arizona*, 451 U. S. 477 (1981), an extension of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Edwards* operates at the outer edge of the Fifth Amendment, suppressing both voluntary waivers and voluntary

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

confessions. Applying the *Oregon* v. *Elstad*, 470 U. S. 298 (1985) will ameliorate some of *Edwards*' harsh consequences to public safety without undermining its protection of the *Miranda* rule. The Maryland Court of Appeals' refusal to apply *Elstad* to *Edwards* needlessly increases *Edwards*' cost to society. Applying *Elstad* to *Edwards* will result in the admission of voluntary confessions which will lead to the conviction of more guilty criminals, which advances the public safety interests that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On September 19, 2002, Straughan Lee Griffin was murdered in front of his home in Annapolis, Maryland. The murderers "shot him in the head, stole his automobile, and ran over his body as they fled from the scene." *Blake* v. *State*, 849 A. 2d 410, 412 (Md. 2004).

Terrence Tolbert was arrested in connection with the crime on October 25, 2003, and implicated the defendant, Leeander Jerome Blake. *Ibid.* The following day, between 4:30 and 5:00 a.m., police arrested Blake at his home. At the time, Blake was wearing boxer shorts, a tank top, and no shoes. He was handcuffed and transported to the Annapolis Police Department, *ibid.*, where he was then taken to a booking room. *Ibid.* In the booking room Detective William Johns, the lead detective in the case, administered the *Miranda*[2] warnings to Blake. *Ibid.* After Blake told the officers that he did not want to speak without a lawyer, he was placed in a holding cell at around 5:25 a.m. See *id.*, at 412-413.

Under Maryland law, Blake was entitled to a copy of his arrest warrant and a statement of his charges. See *id.*, at 413, and n. 3 (quoting Md. Rule 4-212(e)). Detective Johns and Officer Curtis Reese delivered these to Blake at 6:00 a.m. See

2. *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

id., at 413. Johns explained the charges to Blake, telling him that they were serious and that he needed to carefully read the document and understand it. See *ibid.* The statement of charges indicated that he was charged with "first degree murder, second degree murder, armed robbery, armed carjacking, and use of a handgun in a crime of violence." *Ibid.* The charging paper also stated that the penalty for first-degree murder was death, even though Blake was personally not eligible for that punishment under Maryland law, because he was under 18. See *ibid.*

As Detective Johns handed the charging document to Blake and started to leave, Officer Reese appeared and said in a loud and confrontational tone, " 'I bet you want to talk now, huh!' " *Ibid.* Detective Johns was surprised by this statement, and said very loudly within Blake's hearing, " 'No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now.' " *Ibid.* Johns, out of concern for Blake's rights, "told Officer Reese that [Blake] had asked for an attorney and they could not reinitiate any kind of conversation with him." *Ibid.*

Half an hour later, Detective Johns came back to Blake's cell to give him the rest of his clothing, which had been brought to the station by another officer. *Ibid.* As Johns handed Blake the clothing, Blake asked him, " 'I can still talk to you?' " to which Johns responded, " 'Are you saying that you want to talk to me now?' " Blake responded, " 'yes,' " and Johns left the area, returning in a few minutes. *Ibid.* He told Blake that he would have to give Blake the *Miranda* warnings again, and that he would be back in a few minutes. Blake was then taken to the interrogation room, reread his *Miranda* warnings, gave a waiver, agreed to talk without counsel, and made incriminating statements to Detective Johns. See *id.*, at 413-414. He also agreed to take a polygraph exam, where Blake made additional incriminating statements. See *id.*, at 414.

At the suppression hearing, Blake testified that after hearing Officer Reese's statement and seeing that he faced the death

penalty he was scared. *Id.*, at 414. Blake claimed that Johns rather than Blake reinitiated the conversation that led to his interrogation. *Ibid.* When asked why he spoke to Detective Johns after invoking his *Miranda* rights, Blake stated, " 'First it was what Officer Reese said to me "I bet you want to talk now, huh!" I was scared cold. Never went through nothing like this. And I saw my charges and saw I was facing death.' " *Id.*, at 414.

The trial court held that Officer Reese's remark was improper interrogation and, when combined with Blake's youth and the misinformation about the death penalty, invalidated his subsequent waiver, rendering his statements inadmissible under *Miranda* and *Edwards* v. *Arizona*, 451 U. S. 477 (1981). See 849 A. 2d, at 416. The trial court's ruling did not rely on Blake's claim that Detective Johns initiated the conversation that led to the waiver and incriminating statements. See *id.*, at 414-416. The trial court's factual discussion follows Detective Johns' version of events. See App. to Pet. for Cert. 76a; see also *id.*, at 78a (finding Detective Johns' testimony "convincing and truthful").

The state appealed, and the Maryland Court of Special Appeals reversed. See 849 A. 2d, at 416. The Court of Appeals of Maryland granted certiorari "to answer the following question: 'Did the police actions in question constitute the functional equivalent of interrogation?' " *Ibid.* It found that while there was no express questioning after Blake invoked his right to counsel, Officer Reese's comment "amounted to the functional equivalent of interrogation." *Id.*, at 419. The Court also held that Blake did not reinitiate contact with the police in a manner consistent with *Edwards*. While Blake's question " 'I can still talk to you?' might be considered an 'initiation' of contact with the officers in the 'dictionary sense' of the words used in [*Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983)], it could hardly be said that under the circumstances [Blake] initiated the contact as that term is contemplated in the legal sense." *Id.*, at 422. The Maryland high court also ruled that Detective Johns'

remarks following Officer Reese's statement did not "negate the prior unlawful interrogation by Officer Reese" and that the 28-minute period between Reese's remarks and Blake's reinitiation of contact was not long enough to dissipate the taint of the purported *Edwards* violation. See *ibid.* The Court of Appeals reversed the lower court, and reinstated the trial court's order granting the suppression motion. *Id.*, at 243.

This Court granted certiorari on April 15, 2005.

SUMMARY OF ARGUMENT

The Maryland Court of Appeals improperly compromised public safety because of a simple, immediately corrected mistake by a police officer. Neither *Edwards* v. *Arizona* nor *Miranda* v. *Arizona* supports this unfortunate result.

The *Miranda* rule, which suppresses voluntary as well as involuntary confessions, stretches the Fifth Amendment. Recognizing this, the Court applies *Miranda* pragmatically, balancing the costs and benefits of suppression. This has led to several decisions limiting *Miranda* or creating exceptions to it. These limits on *Miranda* are undiminished by the holding in *Dickerson* v. *United States* that *Miranda* announced a constitutional rule.

As an extension of *Miranda*, there is an even greater need to limit *Edwards*' impact on legitimate law enforcement interests. While *Edwards* may protect *Miranda*'s guarantees, it accomplishes this goal at the cost of suppressing even more voluntary confessions. Therefore it should be at least as susceptible to the same limitations as is *Miranda*.

The limitation on *Miranda* found in *Oregon* v. *Elstad* should apply to any purported *Edwards* violation. *Elstad* recognized that the costs of applying the "fruit of the poisonous tree" doctrine to statements made after a prior statement contrary to *Miranda* were too high and the benefits too low. Since *Miranda* excluded voluntary as well as involuntary

statements, there was no reason to analogize it to the Fourth Amendment exclusionary rule. This reasoning applies equally well to *Edwards* violations.

Since *Miranda* and *Edwards* violations come from different fact patterns, *Elstad* applies somewhat differently to *Edwards*. An *Edwards* violation is typically preceded by a *Miranda* warning. Therefore a new *Miranda* warning cannot "cure" the *Edwards* violation. The key to understanding how *Elstad* applies to *Edwards* is that the suspect's decision to initiate a new conversation effectively "cures" any earlier *Edwards* violation. Applying *Elstad*, an initial *Edwards* violation does not taint a subsequent decision by the suspect to initiate discussion with the police about the crime under investigation.

Blake validly waived his rights to silence and counsel when he initiated the conversation with Detective Johns. *Elstad* applies to any alleged violation by Officer Reese of *Edwards*' limits on questioning. His statement was a simple mistake that was quickly corrected by Detective Johns. The break between this encounter and Blake's decision to initiate the conversation with Detective Johns shows that there was no taint that had to be dissipated before Blake could waive his rights. Since Blake never made a suppressible incriminating statement before making his waiver, the case for the validity of his waiver is arguably stronger than the waiver upheld in *Elstad*. The fact that he was handed a charging paper that accurately listed death as the maximum penalty for first-degree murder does not change the analysis. The charging paper did not reflect the fact that Blake was too young to face the death penalty because it was not intended to address the individual's status at that stage of the proceedings. Since this was not an attempt to trick Blake into waiving his rights, it has no constitutional significance.

ARGUMENT

"Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." *Michigan* v. *Tucker*, 417 U. S. 433, 446 (1974).

The Maryland Court of Appeals did not apply this principle to the present case. By suppressing a voluntary confession for an already corrected mistake, the Maryland Court of Appeals improperly elevated *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and *Edwards* v. *Arizona*, 451 U. S. 477 (1981) above their status as prophylactic rules. The proper approach to this case is grounded in *Edwards*' prophylactic nature, and how this Court has treated similar situations in the context of a failure to warn under *Miranda*.

I. As a prophylactic rule for *Miranda*'s prophylactic rule, expanding *Edwards* should be more difficult than expanding *Miranda*.

As this Court has said many times, *Miranda* v. *Arizona*, 384 U. S. 436 (1966) created a prophylactic rule. See, *e.g.*, *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991); *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990); *New York* v. *Quarles*, 467 U. S. 649, 654 (1984); *United States* v. *Patane*, 542 U. S. __, 159 L. Ed. 2d 667, 676, 124 S. Ct. 2620, 2627 (2004) (plurality opinion). *Miranda* thus strikes down perfectly voluntary confessions simply because officers did not follow its prophylactic rule. See *Dickerson* v. *United States*, 530 U. S. 428, 444 (2000). This has led to the Court recognizing several exceptions to *Miranda*'s general rule. See, *e.g.*, *Quarles*, 467 U. S.,

at 657 (public safety); *Harris* v. *New York*, 401 U. S. 222, 226 (1971) (use for impeachment).

The fact that *Dickerson* recognized that *Miranda* was a constitutional rule, see 530 U. S., at 444, does not undermine the decisions recognizing exceptions to *Miranda*. See *Patane*, 159 L. Ed. 2d, at 677, 124 S. Ct., at 2628 (plurality); *id.*, at 680, 124 S. Ct., at 2631 (Kennedy, J., concurring). Nor should *Dickerson*'s rule be considered to have undermined *Miranda*'s status as marking the outer edge of the Fifth Amendment. Although a majority of this Court has not labeled *Miranda* as a prophylactic rule since *Dickerson*, a majority recognizes *Miranda*'s outsider status with respect to the core of the Fifth Amendment. See *Chavez* v. *Martinez*, 538 U. S. 760, 771 (2003) (plurality); *id.*, at 778 (Souter, J., concurring) (characterizing *Miranda* as "outside the Fifth Amendment's core"). Since *Dickerson*, the main source of disagreement over the nature of *Miranda* is the issue of whether *Miranda* can only be violated with the admission of an improperly obtained confession, see *Patane*, 159 L. Ed. 2d, at 764-675, 124 S. Ct., at 2626 (plurality), or whether improper questioning may itself violate the Fifth Amendment even if no evidence is ever admitted. See *id.*, at 680, 124 S. Ct., at 2631 (Kennedy, J., concurring) (choosing to not resolve the question). *Miranda*'s status as a prophylactic rule does not turn on the answer to this question or *Dickerson*'s determination that *Miranda* is a constitutional rule. *Miranda* is prophylactic because its bright-line rule suppresses some voluntary confessions in order to protect the Fifth Amendment self-incrimination privilege. *Dickerson* does not change that fact, and the debate over whether improper questioning can itself violate the Fifth Amendment should not change *Miranda*'s prophylactic status.

Miranda, while a constitutional rule, is still malleable. When the costs of applying *Miranda* outweigh its bright-line exclusionary rule, this Court will not allow that decision to exclude an otherwise voluntary confession. See, *e.g.*, *Quarles*, 467 U. S., at 657; *Patane*, 159 L. Ed. 2d, at 676, 124 S. Ct., at

2627 (plurality). *Miranda* imposes necessary, but artificial constraints upon the courts and police. This Court found it difficult to apply the due process voluntariness test inside the interrogation room. See *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). *Miranda*'s main advantage is that it provides a bright-line "or at least brighter-line" rule, *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993), for officers and the courts to follow. See *Berkemer* v. *McCarty*, 468 U. S. 420, 430 (1984). *Miranda* is best viewed as a necessary compromise which recognizes the inherent pressures of the interrogation room, see *Dickerson*, 530 U. S., at 444, and the difficulty of determining on a case-by-case basis the voluntariness of a confession obtained during custodial interrogation. See *Moran* v. *Burbine*, 475 U. S. 412, 433, n. 4 (1986) ("the [*Miranda*] decision . . . embodies a carefully crafted balance designed to protect *both* the defendant's and society's interests"). Like any compromise, *Miranda* changes as the conditions of its compromise change.

Miranda tilted this balance heavily in favor of accused criminals. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469-1472 (1985). It overprotects the self-incrimination privilege by irrebutably presuming that a confession taken contrary to its rule is involuntary without regard to whether it is in fact involuntary. See *Oregon* v. *Elstad*, 470 U. S. 298, 304, 307, n. 1 (1985). Although there is some coercive pressure inherent in custodial interrogations, see *Miranda*, 384 U. S., at 467, these pressures are not so great that a knowing and intelligent waiver is foreclosed under these circumstances. See *id.*, at 535-536 (White, J., dissenting).

The various exceptions that the Court has created to *Miranda*'s presumption help to ameliorate its potentially harsh compromise. *Stare decisis* is a substantial reason for the continued validity of this most controversial decision. See *Dickerson*, 530 U. S., at 443. If *Miranda* were as inflexible as the Fifth Amendment privilege it protects, there would be a much stronger case for reconsidering it.

While *Miranda* is amenable to exceptions, extensions of its presumption are much more difficult to justify. *Miranda* itself is an extension of the Fifth Amendment privilege against self-incrimination. At this point, extending the privilege requires a " 'powerful showing' " that the need to protect the privilege or judicial enforcement of it outweighs the cost to society. See *Chavez*, 538 U. S., at 778 (Souter, J., concurring) (quoting *Miranda*, 384 U. S. at 515 (Harlan, J., dissenting)). Given *Miranda*'s considerable cost to society, it is appropriate that it should be easier to contract than expand.

Edwards v. *Arizona*, 451 U. S. 477 (1981) has a relationship to *Miranda* and the Fifth Amendment that makes it unique. *Edwards*' rule that all custodial interrogation must cease once the suspect clearly invokes his or her right to counsel, see *id.*, at 485, like *Miranda*, is not required by the Fifth Amendment. See *Davis* v. *United States*, 512 U. S. 452, 458 (1994). Instead, it establishes a "second layer of prophylaxis for the *Miranda* right to counsel," *McNeil*, 501 U. S., at 176, which is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Harvey*, 494 U. S., at 350; accord *Davis*, *supra*, at 458.

If *Miranda*'s prophylactic rule must be justified on a cost/benefit basis, then *Edwards* must be at least as susceptible to this approach. *Miranda*'s prophylactic is already a considerable extension of the Fifth Amendment. *Edwards*' extension of *Miranda* to create a second layer of protection is extraordinary. *Miranda* itself reflects a subtle balance between the needs of society and the rights of the accused. See *Moran*, 475 U. S., at 424. Adding layers to a constitutional edifice is a tricky business. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (Jackson, J., concurring in the result). Courts should be particularly careful in administering prophylaxis upon prophylaxis, or *Miranda*'s subtle balance may be fatally compromised.

Davis applies this principle by reiterating that the invocation of counsel necessary to trigger *Edwards* must be unambiguous. See 512 U. S., at 459. *Edwards* created a "rigid prophylactic rule." *Id.*, at 458 (internal quotation marks omitted). Any expansion of *Edwards*' rigid rule must be justified by the Court. See *id.*, at 459-460. While *Davis*' restrictive view of a successful invocation of counsel may hurt some criminal defendants, this was acceptable given *Edwards*' secondary role in protecting the Fifth Amendment privilege. "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects . . . . [B]ut the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Ibid. Edwards*' extra protections had to be balanced against society's need for effective law enforcement. See *id.*, at 461. Those needs outweighed expanding *Edwards* beyond unambiguously clear assertions of the right to counsel. See *ibid.*

A similar approach should govern this case. Proper analysis of this case closely parallels *Elstad*. While the circumstances are not precisely the same, the case for applying *Elstad*'s approach is at least as strong in the present case, and may even be stronger. See *infra*, at 21-22. *Edwards*' relatively rigid rule may serve an important purpose, but applying it to this case cannot be justified after a careful consideration of the costs and benefits of suppressing the incriminating statements.

II. The rule of *Oregon* v. *Elstad* can apply to a violation of *Edwards* v. *Arizona*.

Even if Officer Reese's statement violated *Edwards* v. *Arizona*, 451 U. S. 477 (1981), Blake's subsequent incriminating statements should not be suppressed. *Oregon* v. *Elstad*, 470 U. S. 298 (1985) provides the analysis to reach the proper result in this case. Its limit on the reach of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) applies to *Edwards* with equal strength. Although there are differences between the questioning

contrary to *Miranda* in *Elstad* and improper questioning under *Edwards*, there are many cases where *Elstad* can apply to keep an inadvertent impropriety under *Edwards* from needlessly tainting a subsequent voluntary waiver and confession.

A. Elstad.

Elstad demonstrates that *Miranda*'s prophylactic rule is applied with some flexibility. Like the present case, *Elstad* addresses a mistake by the police in their first encounter with the suspect. Officers Burke and McAllister went to Elstad's home with a warrant for his arrest for a burglary of a neighbor's home. See 470 U. S., at 300. McAllister asked Elstad's mother to step into the kitchen, where he explained that they had an arrest warrant for her son for the burglary. *Id.*, at 300-301. Officer Burke remained in the living room with Elstad. Burke later testified:

> "I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.' " *Id.*, at 301.

Elstad was then driven to the Sheriff's headquarters and about one hour later was read the *Miranda* warnings for the first time. See *ibid.* Respondent said that he understood these rights and wished to talk to the officer. *Ibid.* He then confessed to the burglary. See *id.*, at 301-302.

Although Officer Burke's initial questioning of Elstad produced an incriminating statement that was arguably inadmissible under *Miranda*,[3] this Court saw no problem in admitting

3. The State conceded that Elstad was in custody, see *id.*, at 315, so the Court assumed that he was. The concession seems dubious.

the subsequent properly warned and waived statement. The Court noted that two metaphors dominated Elstad's argument in favor of suppression, " 'tainted fruit of the poisonous tree' " and "whether a confession can be truly voluntary once the 'cat is out of the bag.' " *Id.*, at 303-304. *Miranda* and the Fifth Amendment right it protects are fundamentally different from the Fourth Amendment exclusionary rule that Elstad's metaphors invoked. See *id.*, at 304. Since Elstad's argument "misconstrues the nature of the protections afforded by *Miranda* warnings and therefore misreads the consequences of police failure to supply them," his argument failed. See *ibid.*

The *Elstad* Court noted *Miranda*'s dramatic change to the law of confessions, as its prophylactic rule "required suppression of many statements that would have been admissible under traditional due process analysis . . . ." *Ibid.* The fact that *Miranda*'s irrebuttable presumption swept more broadly than the Fifth Amendment meant that "patently *voluntary* statements" were suppressed by its rule. *Id.*, at 307 (emphasis in original). Therefore, *Miranda* suppressed statements that could be used in other circumstances such as for impeaching witnesses. See *ibid.*; *Harris* v. *New York*, 401 U. S. 222, 226 (1971). This in turn supported the decision to not extend the rule of *Wong Sun* v. *United States*, 371 U. S. 471 (1963) to the situations found in *Harris* and *Michigan* v. *Tucker*, 417 U. S. 433, 447-448 (1974). See *Elstad*, 470 U. S., at 307-308.

Tucker was particularly illustrative of the relationship between *Wong Sun* and *Miranda*. That case addressed whether *Wong Sun* should be applied to suppress the testimony of a witness who was discovered through custodial interrogation without the benefit of *Miranda* warnings when the interrogation predated the *Miranda* decision. See 417 U. S., at 447-448. The Court held that the failure to warn Tucker "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards laid down by this Court in *Miranda* to safeguard that privilege." *Id.*, at 446. Admissibility was determined by a balancing of interests. It weighed society's

strong interest in admitting relevant, reliable evidence of guilt, see *id.*, at 450, against the minimal extra protection to the legitimate Fifth Amendment interests served by suppressing the witness' testimony. See *id.*, at 447-448. Since Tucker already had the protection of suppressing his own statements under *Miranda*, the balance of interests weighed against any additional exclusion. See *id.*, at 450-451.

Similar reasoning drove the *Elstad* decision.

> "We believe that this reasoning applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." 470 U. S., at 308.

Since *Miranda* can inhibit people from voluntarily giving information to the police, it is restricted to custodial interrogation. See *id.*, at 309. While *Miranda* attempts to provide a clear guideline for the police, *Miranda*'s theory does not always govern its reality. Defining custody is difficult, and the police necessarily make errors while investigating crime. *Ibid.* These errors, however, "should not breed the same irredeemable consequences as police infringement of the Fifth Amendment itself." *Ibid.* Penalizing the state by invalidating a subsequent warned and voluntary statement for an earlier transgression "is an unwarranted extension of *Miranda* . . . ." *Ibid.* While *Miranda* properly suppresses the initial statement, the admissibility of the subsequent statement turns on whether the latter statement is knowing and voluntary. *Ibid.*

The Court then turned to whether the unwarned incriminating statement fatally tainted the subsequent confession. See *ibid.* The time between an actually coerced statement and a later statement is relevant to whether the later statement is

tainted by the coerced confession. See *id.*, at 310. Since a failure to receive *Miranda* warnings does not mean that the first statement was in fact coerced, this principle did not apply to Elstad's second statement. When a warned confession is "preceded by an unwarned, but clearly voluntary admission" the better rule is that there is no need for a clear break between the two statements. See *id.*, at 310-311. The subsequent *Miranda* warning "serves to cure the condition that rendered the unwarned statement inadmissible." *Id.*, at 311.

Allowing "the suspect's conviction that he has let the cat out of the bag," see *ibid.*, to taint the warned confession was inappropriate. Giving voluntary but unwarned statements this power could hamstring the police, as they could not obtain a suspect's cooperation even if actual coercion played no part in either the warned or unwarned statements. See *ibid.* "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of the disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question . . . ." *Id.*, at 312. Determining what motivated a suspect to confess is difficult at best. See *id.*, at 313-314. Presuming compulsion from a prior unwarned statement was unwarranted. See *id.*, at 314.

Elstad was not a retreat from *Miranda*. See *id.*, at 317. However, it did recognize that flexibility was necessary when a warned statement was preceded by an unwarned one. See *id.*, at 318. In that case, the question is whether the second statement is voluntary after looking at the totality of the circumstances. See *ibid.*

Elstad has not diminished with age. *Dickerson* v. *United States*, 530 U. S. 428 (2000) did not invalidate *Elstad* in any way. See *United States* v. *Patane*, 542 U. S. __, 159 L. Ed. 2d 667, 679, 124 S. Ct. 2620, 2630 (2004) (plurality); *id.*, at 680, 124 S. Ct., at 2630-2631 (Kennedy, J., concurring). While *Elstad* cannot be invoked to cover up police abuse designed to

undermine the *Miranda* warnings, it is still undiminished. See *Missouri* v. *Seibert*, 542 U. S. __, 159 L. Ed. 2d 643, 657-658, 124 S. Ct. 2601, 2612-2613 (2004) (plurality) (distinguishing but not questioning *Elstad*); *id.*, at 659-660, 124 S. Ct., at 2615-2616 (Kennedy, J., concurring) ("*Elstad* was correct in its reasoning and its result").

B. Elstad and Edwards.

Elstad's reasoning also applies to situations covered by *Edwards*. Just as *Miranda*'s status as a prophylactic rule was key to *Elstad*, the fact that *Edwards* is a second layer of prophylaxis is a compelling argument to adopt *Elstad* in the proper circumstances. *Elstad* is based on the notion that statements taken contrary to *Miranda* v. *Arizona*, 384 U. S. 436 (1966) can be voluntary, see *supra*, at 13, and that society should not be unduly penalized for a simple mistake in administering *Miranda*. See *supra*, at 14. This same situation applies in *Edwards*. *Edwards*' explicitly bright-line rule, see *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988), suppresses voluntary waivers and voluntary confessions. Interrogation after a request for counsel does not necessarily transform simple interrogation into coercion. *Edwards*, by forcing the police to cut off questioning as soon as the right to counsel is invoked, is intended to prevent police from "badgering" suspect's into waiving their rights, see *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990), which makes sure that any following statement "is not the result of coercive pressures." *Minnick* v. *Mississippi*, 498 U. S. 146, 151 (1990). It is not that every question after the invocation of counsel necessarily renders any statement coerced as a matter of fact. See *Solem* v. *Stumes*, 465 U. S. 638, 644 (1984). Rather, given the risks of badgering from prolonged questioning, and the difficulty of determining on a case-by-case basis how much questioning is in fact too much, the *Edwards* rule acts to "conserve judicial resources" by keeping the courts from having to make such difficult decisions. *Minnick*, *supra*, at 151.

Since *Miranda*'s relatively bright line also excludes voluntary confessions, see *supra*, at 7, and *Edwards* is simply an extension of *Miranda*, *Edwards* leads to even more voluntary confessions being suppressed than under an unadorned *Miranda* rule. Indeed, this Court has noted that *Edwards* excludes otherwise voluntary waivers. See *Harvey*, 494 U. S., at 353. The *Elstad* Court took great care to prevent a simple *Miranda* violation from having the same consequences as an actual Fifth Amendment violation. See 470 U. S., at 309. Since *Edwards* is even more attenuated from the Fifth Amendment than *Miranda*, this reasoning applies with even greater force in *Edwards* cases.

Miranda and *Edwards* are not identical. The typical *Miranda* violation contemplated by *Elstad* is custodial questioning without a warning. See *id.*, at 301. The "slippery" task of defining "custody" was invoked by the *Elstad* Court as one justification for its decision. See *id.*, at 309. Under *Elstad*, the subsequent *Miranda* warning helps to cure the initial failure to warn. See *id.*, at 310-311.

Edwards violations usually occur after the *Miranda* warnings are given. In a typical *Edwards* case, the officers will recite the *Miranda* warnings to the suspect in custody, who will then ask for counsel, with interrogation after the invocation of the right to counsel establishing the *Edwards* violation. See, *e.g.*, *Edwards*, 451 U. S., at 478-479; *Roberson*, 486 U. S., at 678. When a suspect invokes the right to counsel, reciting the *Miranda* warnings again does not "cure" the suspect's decision to invoke the right to counsel. Unless the suspect chooses to initiate a new conversation, see *Edwards*, *supra*, at 485, additional *Miranda* warnings are irrelevant.

The factual variation between *Miranda* and *Edwards* does not render *Elstad* irrelevant to *Edwards* cases. Although they may involve different facts, *Miranda* and *Edwards* cases operate under the same general principles. The factual differences between the two simply means that *Elstad* applies differently in *Edwards* cases than it does in *Miranda* cases.

Elstad's main principle is that an officer's good faith mistake in administering *Miranda* does not forever taint all future encounters between the officers and the suspect. See *supra*, at 14. This principle can be applied to *Edwards* without doing violence to *Edwards*, *Miranda*, or the suspect's legitimate Fifth Amendment interests. Applying *Elstad*, asking a question after a suspect invokes the right to counsel should not weigh against the validity of the suspect's decision to initiate the conversation after the improper questioning is ended. Any admissions made in response to the improper questioning would be suppressed, but if the suspect chose to initiate speaking to the police at some later time, then the initial *Edwards* violation does not render any later decision to speak presumptively involuntary.

Edwards' underlying rationale is that officers must honor the suspect's request to have counsel present during interrogation. See *Davis* v. *United States*, 512 U. S. 452, 460 (1994). "*Edwards* is based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." See *Harvey*, 494 U. S., at 350. Suppressing the responses to any improper questioning is enough protection for these interests. *Edwards* prohibits interrogation, see 451 U. S., at 484-485. Interrogation is primarily meant to elicit information from the suspect. If the police cannot use the information obtained from the improper interrogation, then the questioning has been frustrated.

Edwards recognizes the suspect's right to initiate the conversation after invoking the right to counsel. See 451 U. S., at 485. The fact that an officer may have mistakenly questioned the suspect after he or she invoked the right to counsel should not deprive the suspect of the ability to subsequently initiate a conversation with the officers and make a valid waiver of the rights to silence and counsel. To hold to the contrary would "imprison a man in his privileges and call it the Constitution." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942). If a *Miranda* violation does not taint a subsequent

knowing and intelligent waiver, see *Elstad*, 470 U. S., at 309, then questioning contrary to *Edwards* should not taint a subsequent decision to initiate a conversation with the police.

Elstad held that it would be an unwarranted extension of *Miranda* to hold that failure to administer the warnings irrevocably taints the suspect's ability to waive his rights for "some indeterminate period." *Ibid.* This distinguished the Fourth Amendment doctrine that there must be "intervening events [that] break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.' " *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982) (quoting *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975)); accord *Elstad*, 470 U. S., at 306. This rationale can be adapted to fit *Edwards*' special needs.

Applying *Elstad* to *Edwards* does not mean that the state may characterize any statement from the suspect as an attempt to initiate speaking to the police. In *Edwards*, the police approached the suspect one day after he invoked the right to counsel and told him that they would question him again, after which Edwards agreed to talk to the police. See 451 U. S., at 479. Edwards' decision to talk was not a decision to initiate contact as this Court properly held. See *id.*, at 487. Applying the rule of *Elstad* to *Edwards* does not change this conclusion.

Determining whether the suspect initiated the conversation after an invocation is a question that courts and police applying *Edwards* must already address. See *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983). While a majority of the Court in *Bradshaw* could not agree on what constituted initiation, see *id.*, at 1048 (Powell, J., concurring), applying *Elstad* to *Edwards* does not add to a court's burden when addressing this issue. It simply recognizes that a prior *Edwards* violation has no bearing on whether the suspect did in fact subsequently initiate contact with the police.

Edwards does require some break between the first encounter and a decision by the suspect to initiate the conversation.

Therefore, before the suspect can initiate the conversation, it is necessary that any prior interrogation must cease. See *Christopher* v. *Florida*, 824 F. 2d 836, 845 (CA11 1987). Even though there was a one-hour delay between the unwarned custodial questioning and the subsequent valid waiver in *Elstad*, see 470 U. S., at 301, *Elstad* stated that no delay is required for a valid waiver after improper questioning. See *id.*, at 310-311. While this cannot apply to *Edwards*, the rest of *Elstad* fits with *Edwards*. Most importantly, the fact that interrogation must first stop does not import the "fruit of the poisonous tree" doctrine of *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963). *Edwards*, a "corollary to *Miranda*," see *Roberson*, 486 U. S., at 680, is no closer to this Fourth Amendment rule than is *Miranda*. The relatively substantial break between the Fourth Amendment violation and the confession in the *Wong Sun* line of cases is not necessary to establish the initiation of the dialog under *Elstad*. Instead, once the suspect asks for counsel, the necessary break between the initial encounter and the suspect's decision to initiate the conversation is the same whether or not the suspect is first improperly questioned under *Edwards*.

Applying *Elstad* will not impermissibly blur *Edwards*' bright line. Clarity is a goal advanced by *Miranda* as well as *Edwards*, see *id.*, at 681, and like *Miranda*, *Edwards* cannot be crystal clear. *Edwards* is predicated upon custody, which can be a difficult issue for police. See *Elstad*, 470 U. S., at 309. *Bradshaw* demonstrates that the standard for determining whether the suspect initiated the conversation is still undefined by this Court. If *Elstad* did not excessively blur *Miranda*'s somewhat bright line, then it will do no worse to *Edwards*'.

Applying *Elstad* to *Edwards* will allow more voluntary confessions to be admitted at trial. Given the states' compelling interest in utilizing such statements, see *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986); *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991), and the minimal harm that their admission will do

to the interests protected by *Edwards* and *Miranda*, the balance weighs strongly in favor of applying *Elstad* to *Edwards*.

III. Blake's *Miranda* waiver was knowing and voluntary.

Applying *Oregon* v. *Elstad*, 470 U. S. 298 (1985) to this case demonstrates that Blake's *Miranda* v. *Arizona*, 384 U. S. 436 (1966) waiver was knowing and voluntary. While there are differences between the two cases, the argument that the waiver in the present case is valid is as strong or stronger than it was in *Elstad*. Blake's encounter with the police demonstrates that an initial violation of *Edwards* v. *Arizona*, 451 U. S. 477 (1981) does not necessarily taint the suspect's subsequent decision to initiate conversation with the police, waive his *Miranda* rights, and incriminate himself.

The primary ways in which the present case differs from *Elstad* are the allegedly improper interrogation under *Edwards*, the lack of a prior unwarned incriminating statement, and the lack of personalized information about Blake's potential punishment. Officer Reese's statement to Blake, while potentially improper under *Edwards*, does not distinguish *Elstad* from the present case. Reese did not repeatedly interrogate Blake in some effort to break down his will to remain silent outside the presence of counsel. Instead, Reese's statement was immediately contradicted by his superior, Detective Johns, who effectively informed Blake that he did not have to respond to Reese's statement, and that no further questioning would take place. See *supra*, at 3.

Just as the subsequent *Miranda* warning in *Elstad* "serves to cure the condition that rendered the unwarned statement inadmissible," see 470 U. S., at 311, Detective Johns' statement neutralized any damage to Blake's rights caused by Officer Reese's statement. Detective Johns' immediate correction of Officer Reese's mistake was no mere empty promise. Interrogation was cut off and the encounter effectively ended before Blake could respond to Officer Reese's statement. Blake was

not questioned during the time between Detective Johns' statement and when Blake chose to initiate the conversation about 30 minutes later. See *supra*, at 3. Even then, Detective Johns did not immediately take up the conversation. Instead, he simply asked Blake if he wanted to talk to him. See *supra*, at 3. The discussion took place several minutes later in the interrogation room, and only after Blake was again given his *Miranda* warnings and waived his rights. See *supra*, at 3. Applying *Elstad*, Officer Reese's improper statement did not unconstitutionally taint Blake's decision to initiate the conversation, and waive his rights to silence and counsel.

This conclusion is reinforced by the second difference between *Elstad* and the present case, the fact that Blake never made a suppressible incriminating statement before he decided to waive his rights. While the *Elstad* Court held that letting *Miranda*'s "cat out of the bag" did not invalidate a *Miranda* waiver, see *id.*, at 313-314, this does not mean that the absence of unwarned incriminating statements is irrelevant to the validity of Blake's waiver. Even if the effects of a prior voluntary statement are "speculative and attenuated at best," *ibid.*, silence is less damaging to voluntariness than any prior incriminating statement, no matter how voluntary that prior statement may have been. While Elstad could not be expected to know whether his prior statement was inadmissible, see *id.*, at 316, Blake *knew* he could avoid incriminating himself by simply keeping silent. Although accurate knowledge of the admissibility of the prior statement was not necessary for Elstad's waiver to be valid, see *id.*, at 317, Blake was still in a *better* position to make a knowing and voluntary waiver than Elstad.

The lack of personalized information about Blake's eligibility for capital punishment does not change the analysis of his waiver. Improper information does not necessarily invalidate a waiver of rights. While *Miranda* does forbid police from using tactics "to induce a confession out of trickery," 384 U. S., at 453, the Constitution does not require that the suspect

be perfectly informed before making a valid waiver. As noted, "[t]his Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Elstad*, 470 U. S., at 316. Similarly, the police are not required to inform the suspect about the scope of the questioning, see *Colorado* v. *Spring*, 479 U. S. 564, 577 (1987), or inform him that counsel wishes to contact him. See *Moran* v. *Burbine*, 475 U. S. 412, 422-423 (1986).

Certain forms of misinformation will invalidate a waiver. Misrepresenting that a failure to cooperate with authorities will cause the suspect to lose financial aid, or that a friend will lose a job as a police officer if the suspect does not cooperate invalidates the waiver. See *Spring*, 479 U. S., at 576, n. 8 (citing *Lynum* v. *Illinois*, 372 U. S. 528 (1963); *Spano* v. *New York*, 360 U. S. 315, 323 (1959)). *Miranda* condemned as trickery the police tactic of using rigged lineups in which the defendant is falsely identified as the guilty party. See 384 U. S., at 453. That type of intentional deception is not present here. What is unconstitutional in these cases is deception about the interrogation itself, either by falsely stating that silence would be punished, or in the *Miranda* example, that admitting guilt effectively has no further consequence.

The incomplete information in the charging papers is not this form of trickery. There is no evidence that the statement of the maximum sentence in the charging papers was an attempt to trick Blake into confessing. The charging paper is computer generated, and it states the maximum penalty allowed for that crime under the law. See App. to Pet. for Cert. 39a. Since the penalty entries are not set to the individual defendant at this stage of the proceedings, see *ibid.*, Blake's charging paper indicated death as a possible sentence. This is in fact the maximum sentence for the crime under Maryland law. Although this could not apply to Blake, there was no deception intended to trick a confession out of Blake.

Blake was not deceived about the consequences of his decision to speak. Although his self-serving testimony indi-

cates that the threat of capital punishment may have partially motivated him to speak, see *Blake* v. *State*, 849 A. 2d 410, 414 (Md. 2004), it is no less true that Maryland never deceived Blake about the consequences of his decision to speak. He knew that he had a right to remain silent and a right to counsel. See *supra*, at 3. He also knew the fact that his accomplice had implicated him, a fact that also motivated him to speak for himself. See Pet. for Cert 5. Nothing more is necessary for a knowing and voluntary waiver.

"Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statement to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Moran*, 475 U. S., at 422-423. This is what happened to Blake. He was well informed of his rights and the consequence of speaking. No one coerced him into any action. Neither Officer Reese's corrected mistake nor the operation of a computer program changes these circumstances or the validity of Blake's waiver.

CONCLUSION

The decision of the Maryland Court of Appeals should be reversed.

June, 2005

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

No. 04-373

Supreme Court, U.S.
FILED
AUG 1 - 2005
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND

Petitioner,

— v. —

LEEANDER JEROME BLAKE,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
COURT OF APPEALS OF MARYLAND

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

Of Counsel:
Joshua L. Dratel
Co-Chair, NACDL Amicus Committee
1150 18th Street, N.W. - Suite 950
Washington, D.C. 20036
(202) 872-8600

James J. Tomkovicz
Counsel of Record
University of Iowa
College of Law
Iowa City, Iowa 52242
(319) 335-9100

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT

I. VIOLATIONS OF THE PROHIBITION ON POLICE-INITIATED INTERROGATION FOLLOWING CLEAR REQUESTS FOR COUNSEL SHOULD NOT BE "CURABLE" DURING THE SAME CUSTODIAL INTERROGATION 9

A. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule Is Inconsistent With The Vital Purposes and Objectives Of That Rule 10

B. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule During The Same Custodial Interrogation Will Undermine The Vital Interests In Clarity and Guidance For Law Enforcement And Courts 12

C. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule Will Invite Circumvention Of The Essential Safeguards Provided By That Rule 14

D. The Balance of Interests At Stake Does Not Justify The Conclusion That *Edwards* Violations Are Curable 16

II. IF VIOLATIONS OF THE *EDWARDS* PROHIBITION ARE DEEMED CURABLE DURING THE SAME CUSTODIAL INTERROGATION, ONLY MEASURES THAT CLEARLY ELIMINATE THE RISKS GENERATED BY OFFICIAL INITIATION SHOULD SUFFICE 19

III. UNDER ANY DEFENSIBLE STANDARD FOR DETERMINING WHETHER THE IMPACT OF AN IMPROPER OFFICIAL INITIATION HAS BEEN ELIMINATED, THE RECORD BELIES THE POSSIBILITY THAT THE GRATUITOUS AND COERCIVE VIOLATION OF THE *EDWARDS* RULE WAS CURED 23

CONCLUSION 30

TABLE OF AUTHORITIES

Cases ***Page***

Arizona v. Roberson,
486 U.S. 675 (1988) 9, 11, 13, 15, 16, 20, 27

Blake v. State,
381 Md. 218, 849 A.2d 410 (2004)
..... 3, 4, 5, 24, 25, 26, 27, 29

Davis v. United States,
512 U.S. 452 (1994) 9, 12, 13, 17, 19, 22

Dickerson v. United States,
530 U.S. 428 (2000) 11

Edwards v. Arizona,
451 U.S. 477 (1981) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30

Harris v. New York,
401 U.S. 222 (1971) 16

Johnson v. United States,
333 U.S. 10 (1948) 15

McNeil v. Wisconsin,
501 U.S. 171 (1991) 11

Michigan v. Harvey,
494 U.S. 344 (1990) 11

Michigan v. Mosley,
423 U.S. 96 (1975) 11, 19, 26

Page

Minnick v. Mississippi,
498 U.S. 146 (1990) 9, 11, 12, 13, 15, 17, 18, 22, 28

Miranda v. Arizona,
384 U.S. 436 (1966)
..... 1, 5, 8, 12, 13, 14, 15, 16, 17, 18, 19, 23, 28, 30

Missouri v. Seibert,
124 S.Ct. 2601 (2004) 8, 11, 12, 13, 14, 15, 16

Moran v. Burbine,
475 U.S. 412 (1986) 17

New York v. Quarles,
467 U.S. 649 (1984) 16

Oregon v. Bradshaw,
462 U.S. 1039 (1983) 9, 27

Oregon v. Elstad,
470 U.S. 298 (1985) 15

Oregon v. Hass,
420 U.S. 714 (1975) 18

Patterson v. Illinois,
487 U.S. 285 (1988) 12

Rhode Island v. Innis,
446 U.S. 291 (1980) 18, 27, 28

United States v. Gomez,
927 F.2d 1530 (11th Cir. 1991) 4

Page

United States v. Patane,
124 S.Ct. 2620 (2004) 8, 16, 18

INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation composed of more than 11,000 attorneys and 28,000 affiliate members in 50 states. *Amicus* is dedicated to ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of American criminal justice systems, and preserving the principles of liberty and equality embodied in the Bill of Rights.

STATEMENT OF THE CASE

On September 19, 2002, Straughan Griffin was shot and killed in front of his Annapolis home. The authorities arrested Terrence Tolbert on October 25, and he made a statement implicating respondent, Leeander Blake, in the killing. Blake, a 17-year-old, was arrested at his home between 4:30 and 5:00 a.m. the next day. While clad in only boxer shorts and a tank top, he was transported to the Annapolis Police Department and escorted to an intake room. Lead Detective William Johns advised Blake of his *Miranda* rights. When he responded by clearly and unambiguously requesting the assistance of counsel, Blake was placed in a holding cell. The time was approximately 5:25 a.m.

At 6:00 a.m., Detective Johns came to the cell. In accordance with Maryland law, he handed Blake a copy of the arrest warrant and a statement of charges. The statement

---

1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

indicated that Blake was charged with first and second degree murder, armed robbery, armed carjacking, and use of a handgun in a crime of violence. Although Blake's age made him ineligible for capital punishment, the document declared that the penalty for first degree murder was "DEATH." It also asserted that Tolbert had accused Blake of shooting Griffin, taking his car keys, and running over him while leaving the scene. Johns explained the charges to Blake, stating that they were serious and informing him that he needed to read the document carefully and make sure he understood it.

When Johns turned to leave the cell, Officer Reese, who had no ostensible reason to be present, said to Blake in a loud and confrontational tone, "I bet you want to talk now, huh!" Johns reacted by telling Reese, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." He then pushed Reese from the cell block.

Blake remained in the cell, still wearing only his underwear. Just twenty-eight minutes later, Detective Johns returned. When he walked in front of the cell and handed Blake his clothing, Blake inquired, "I can still talk to you?" Johns asked if he now wanted to talk, and Blake said that he did. A few minutes later, Blake was once again advised of his rights. He waived those rights and agreed to talk without counsel. He then made incriminating statements, explaining his involvement in the events of September 19. Blake also agreed to submit to a polygraph examination. He was transported to another location, took the polygraph, and then made additional statements.

Blake was indicted for first and second degree murder and manslaughter. Before trial, he moved to suppress his statements. At a suppression hearing, Blake testified that when Detective Johns came to the cell with his clothing, he decided to speak because of Officer Reese's earlier statement and

because he was scared after seeing that he "was facing death." The judge granted the motion to suppress, finding that Blake had requested counsel and that even though he had not indicated a change of heart, Officer Reese had interrogated him. She determined that "Blake's question [of Johns was] in direct response to Reese's previous statement," emphasizing that a mere twenty-eight minutes elapsed between Reese's remark and Blake's inquiry and concluding that the evidence showed "one continuous stream of events." According to the judge, the state did not carry its "heavy burden" of showing that Blake's "waiver was not the result of the previous coercive unlawful police conduct."

In an unreported opinion, the Court of Special Appeals reversed the Circuit Court's ruling on the sole ground that Officer Reese's statement was not "interrogation." The Maryland Court of Appeals then reversed the intermediate court's ruling, affirming the trial court's suppression order. 381 Md. 218, 849 A.2d 410 (2004). The court devoted most of its opinion to the question of whether Officer Reese had interrogated Blake, concluding that interrogation had indeed occurred. It then turned attention to the State's contention that Blake had "reinitiated" the interrogation and had then waived his rights. The court noted that the Circuit Court judge, by finding that Blake's "question was 'in direct response to' Officer Reese's coercive statement," had effectively concluded that "the police [had] reinitiated the contact" after Blake had invoked his right to counsel. *Id.* at 238, 849 A.2d at 422.

The court agreed that the police had violated the rule of *Edwards v. Arizona* by initiating contact with Blake after his request for counsel. Blake's inquiry whether he could "still talk to" Officer Johns was not an initiation "in a legal sense" because it was preceded by the delivery of

a document that [erroneously] told him he was

> subject to the death penalty . . .; [Blake] was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that [he] might want to talk; and the misstatement as to the penalty as . . . 'DEATH' had never been corrected. [Moreover, t]here was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive [sic] interrogation. *Id.* at 239, 849 A.2d at 422.

Significantly, the court "reject[ed] the State's argument that . . . Detective Johns somehow cured the violation by" his reaction to Officer Reese's impropriety. *Id.* According to the court, the trial judge's conclusion that Johns's "remarks did not negate" the effect of Reese's conduct "was not clearly erroneous," and the "very short," twenty-eight minute break between Reese's impropriety and Blake's "inquiry . . . indicat[ed] that the latter was a continuation of the former." *Id.* The "record support[ed] the . . . finding that [Blake's] question was in direct response to Officer Reese's" conduct and that he "did not 'initiate' conversation with the police." *Id.* at 239-40, 849 A.2d at 422. In sum, the Court of Appeals did not reject the possibility that the authorities *could* cure a violation of the prohibition on police-initiated interrogation following a clear request for counsel. The court merely held that the record and findings in this case did not support the contention that a "cure" had been effected. The court evinced concern that if courts were excessively willing to validate the authorities' claims that they had "cured" their unlawful initiations, the protections afforded by *Edwards v. Arizona* "'would be rendered meaningless.'" *Id.* at 240, 849 A.2d at 423 (quoting *United States v. Gomez*, 927 F.2d 1530, 1539 (11th Cir. 1991)). Ultimately, the court ruled "that all statements made by [Blake] after he invoked his *Miranda* rights [were]

inadmissible and [that] the motion to suppress the statements was properly granted." *Id.*

The State of Maryland petitioned this Court for a writ of *certiorari* to the Court of Appeals of Maryland. The petition raised a single question: whether the rule of *Edwards v. Arizona* should be interpreted to permit the authorities to "cure" their violations of the prohibition on police-initiated interrogation following a suspect's invocation of his right to counsel. Put otherwise, the question presented was whether a court may properly conclude that a suspect has initiated communications with the police *after* an improper official initiation. On April 18, 2005, this Court granted the writ.

SUMMARY OF ARGUMENT

According to the *Miranda* doctrine, a request for counsel by a suspect in custody is a "significant event" that calls for additional Fifth Amendment safeguards. Following a suspect's assertion of his right to counsel, officer-initiated interrogation is forbidden. If officers do initiate communications in violation of this prohibition, it should not be possible for them to "cure" that violation during the same custodial interrogation. Recognition of a cure option is inconsistent with the goal of protecting suspects against badgering by the authorities and with the objective of preventing the unconstitutional introduction of compelled statements. No supposedly curative measures can adequately respond to the heightened, "unacceptably great" risk of compulsion generated by the official impropriety.

The provision of clear guidance and bright-line rules for officers and courts is one of *Miranda*'s principal advantages. Endorsement of the possibility that officers can cure the harm done by improper initiations would seriously undermine the clarity of and guidance provided by the rule of

Edwards v. Arizona. Denying the cure option would further vital interests in clarity and guidance.

In addition, allowing officers to cure violations of the rule against post-invocation initiation will invite officers to circumvent that rule. The possibility of transgressing the *Edwards* prohibition then taking curative steps will tempt officers to exploit the vulnerability of those who have clearly evinced a need for assistance. The result will be an erosion of respect for an essential Fifth Amendment safeguard outside the courtroom and heightened risks of constitutional violations in the courtroom.

Finally, the balance of interests does not justify a cure option. The interests in safeguarding against intensified risks of compulsion, in maintaining *Miranda*'s clarity, and in not providing incentives to circumvent the *Edwards* rule are weighty. On the other hand, the current law already provides a number of alternatives for obtaining uncoerced statements from suspects–even those who have asserted their entitlement to counsel. These alternatives adequately serve legitimate interests in effective law enforcement. Adding the possibility of violating the *Edwards* rule, then curing those violations, can only skew the balance by increasing the harm to the Fifth Amendment interests served by *Miranda* while only marginally furthering proper law enforcement efforts.

If the Court does endorse the possibility of curing *Edwards* violations, the same balance of interests dictates adoption of a stringent, demanding standard for determining whether the risks of improper initiation have been eliminated. The psychological impact on a vulnerable suspect of seeing and hearing officers disregard a request for assistance is likely to be devastating. A cure standard that is appropriately sensitive to the objectives of *Edwards* must seek to ensure that this impact, and the consequent risks of compulsion, have been

entirely eliminated. The law should demand proof by the government that there is *no* causal connection between the official misconduct and the suspect's willingness to discuss the investigation. Put simply, if cure is possible, it should be found *only* if it is clearly established that a reasonable person in the suspect's position would not have been influenced or prompted to initiate communications by the officer's earlier initiation. This demanding standard is needed to respond to the constitutional risks the officers have created. Moreover, this heavy burden is fair, even-handed, and justified because the increased risks are the direct result of avoidable, official impropriety and because a suspect, to gain the additional protection furnished by *Edwards*, must clearly and unambiguously express a desire for counsel.

Under *any* rational standard for evaluating whether an official initiation has been cured, even a standard that is inappropriately lenient, the record in this case cannot possibly support a conclusion that the police cured their transgression. The 17-year-old suspect, arrested in the early morning and wearing only underwear, was transported to a holding cell. He clearly asked for counsel. Less than half an hour later, Detective Johns delivered a document that informed him that he was charged with murder, falsely stated that the penalty was DEATH, and included a blame-shifting statement by another man. The detective stressed the serious nature of the charges and instructed the suspect to read the document. Officer Reese, who had no reason to be present, directly challenged the suspect to respond, stating, "I bet you want to talk now, huh!" Each officer's conduct constituted a coercive initiation of communications. Both in combination sent an overpowering message of disregard for the suspect's need for assistance.

The State's argument that the risks were cured rests entirely on the a single fact–that Detective Johns reacted to Officer Reese's remark by saying that they could not talk to the

suspect and by pushing him from the jail cell. This minimal action, which was not directed toward the suspect, could not have begun to combat the risks engendered by Reese's charged statement. Moreover, no effort was made to combat the impact of Detective Johns's unjustified actions and words and of the erroneous message that the suspect was facing DEATH. When the detective returned to the cell a mere thirty minutes later, the suspect asked whether he could "*still* talk" to the officer. The evidence showed and the lower courts found that this inquiry was directly responsive to Officer Reese's improper remark. The State concedes that it was a reaction to the information in the document that he had received. The strong causal connections between the official initiations of communications and the suspect's conduct preclude a finding of cure and a conclusion that the suspect initiated the exchange that led to his admissions. The decision of the Court of Appeals should be affirmed.

ARGUMENT

After nearly four decades as the law of the land, the dictates of *Miranda v. Arizona*, 384 U.S. 436 (1966), have become "important and accepted element[s] of the criminal justice system." *Missouri v. Seibert*, 124 S.Ct. 2601, 2614 (2004) (Kennedy, J., concurring). Yet *Miranda*'s vital "protect[ion] against violations of the Self-Incrimination Clause," *United States v. Patane*, 124 S.Ct. 2620, 2626 (2004), will not long remain "important" or "accepted" if both its exclusionary consequences–*i.e.*, the shield it furnishes in the courtroom–and its substantive standards–*i.e.*, the shelter it provides in the police station–are consistently diluted. The narrowness of the specific question before the Court should not obscure the significance of the competing interests involved. At stake here are the integrity and fairness of the balance of interests underlying *Miranda*, the clarity of the guidance provided by the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), and, ultimately, the preservation of respect for the Fifth Amendment privilege. A just balance *in this case* requires affirmance of the lower court's ruling. A fair balance *for all cases* requires affirmation of the constitutional protection that *Edwards* extends to the most vulnerable suspects.

I. VIOLATIONS OF THE PROHIBITION ON POLICE-INITIATED INTERROGATION FOLLOWING CLEAR REQUESTS FOR COUNSEL SHOULD NOT BE "CURABLE" DURING THE SAME CUSTODIAL INTERROGATION

An "assertion of the right to counsel [is] a significant event" that calls for "additional safeguards" against violation of the Fifth Amendment privilege. *Edwards v. Arizona*, 451 U.S. at 484-485. Consequently, when a suspect in custody invokes his right to counsel, officers may interrogate him *only* if counsel is present or the suspect initiates further communications. *Edwards v. Arizona*, 451 U.S. at 484-85; see also *Davis v. United States*, 512 U.S. 452, 458 (1994); *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990); *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983). If officers initiate communications with the suspect, no waiver of rights can be valid. See *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (waiver at authorities' instigation is presumed compelled, not the product of voluntary choice). The first question here is whether a violation of the rule barring the initiation of communications by officers can be cured. As a general rule, official violations of the *Edwards* rule should not be "curable."[2] Once officers have initiated communications with

2. It is not the contention here that after an officer initiates communications following a request for counsel, a suspect himself can *never* (continued...)

a suspect in custody, it should not be possible to conclude that the suspect has initiated communications with the authorities, countermanding his decision to rely on counsel.[3]

A. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule Is Inconsistent With The Vital Purposes and Objectives Of That Rule

The prohibition of officer-initiated interrogation following a suspect's clear request for counsel was developed in response to this Court's well-founded belief that a suspect who has unambiguously expressed a need for assistance to the authorities has demonstrated an incapacity and vulnerability that dramatically heighten the risks of compulsion already inherent in the custodial interrogation atmosphere. The purpose of the ban on officer-initiated interrogation is to prevent the authorities from "badgering a [suspect] into waiving his previously asserted . . . rights." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). The ultimate objective is to "ensure[] that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick v. Mississippi*, 498 U.S. at 151.[4] This "second layer of prophylaxis," *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991), is a necessary shield against an "unacceptably great" risk, see *Dickerson v. United States*, 530 U.S. 428, 442 (2000), that a suspect will be compelled to confess and that his compelled statement will be used to incriminate him in violation of the Fifth Amendment. See *Missouri v. Seibert*, 124 S.Ct. at 2608 (suspect's exercise of rights must be honored to reduce the risk of coercion and to enforce the Self-Incrimination Clause).

By improperly initiating communications with a suspect who "believes that he is not capable of undergoing . . . questioning without advice of counsel," *Arizona v. Roberson*, 486 U.S. at 681, and has "expressed his own view that he is not competent to deal with the authorities without legal advice," *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in the result), officers exploit the suspect's weakness, intensify the pressures already present, and engender an undeniably "serious risk" of compulsion. *Roberson*, 486 U.S. at 686. Indeed, when officers confront an avowedly vulnerable suspect with the message that his need for counsel will not be honored the presumption of compulsion

---

2. (...continued)
initiate communications with law enforcement. The contention here is that a bright-line rule ought to govern as long as the same custodial interrogation continues. If the facts clearly establish that a subsequent custodial interrogation is a *genuinely separate and distinct experience* from the one in which officers failed to respect the *Edwards* prohibition, it may be possible for a suspect to initiate communications with the authorities. Factors potentially relevant to deciding whether an interrogation context is genuinely separate and distinct could include the length of time that has passed, whether custody has been continuous or interrupted, whether the officers are the same, and whether the offense is the same, among others. The relevant question would be whether the suspect, or a reasonable person in the suspect's position, would understand the custodial interrogation to be entirely independent of the one in which officers disregarded or ignored his request for assistance and no single fact should automatically be determinative.

3. Because "initiation," by definition, is an inquiry into who *first* expressed a desire to discuss the investigation, once officers initiate communications, a suspect cannot initiate communications during the same custodial interrogation.

4. The State at times describes the purpose of the *Edwards* rule correctly. Some of its descriptions, however, misleadingly suggest that *Edwards* was designed "to ensure that a suspect retains the right to choose whether to remain silent or speak to the police." Brief for Petitioner at 16, 17. Clearly, the *Edwards* rule does not preclude a suspect from changing his mind on his own, but its thrust and its prime objective is to *protect* needy, vulnerable suspects against compulsion, *not* to preserve their right to choose.

that underlies *Miranda*'s preventive scheme is *most* justified.[5] As long as the same custodial interrogation continues, a subsequent communication by the suspect should be presumed to be the result of the officer's impropriety, not the product of an unprompted, voluntary change of heart regarding the need for assistance.

Because "[p]reserving the integrity of the accused's choice to communicate with the police only through counsel is the essence of *Edwards* and its progeny," *Patterson v. Illinois*, 487 U.S. 285, 291 (1988), the Court should hold that a suspect cannot initiate communications once communications have already been initiated by the authorities. The "cure" option advocated here "is inconsistent with *Edwards*'[s] purpose to protect the suspect's right to have counsel present at custodial interrogation," *Minnick v. Mississippi*, 498 U.S. at 154, and would seriously undermine the primary objective of ensuring that convictions are not based upon coerced statements. A recognition that violations can be cured during the same custodial interrogation would "effectively threaten[] to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." *Missouri v. Seibert*, 124 S.Ct. at 2613.

B. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule During The Same Custodial Interrogation Will Undermine The Vital Interests In Clarity and Guidance For Law Enforcement And Courts

---

5. See *Davis v. United States*, 512 U.S. at 472-73 (Souter, J., concurring in the judgment)(when a suspect's expressed wish for counsel is ignored, in contravention of the rights recited, "he may well see further objection as futile and confession . . . as the only way to end his interrogation").

In general, the "clarity" of *Miranda* doctrine "is one of its strengths." *Missouri v. Seibert*, 124 S.Ct. at 2616 (Kennedy, J., concurring in the judgment); see also *Arizona v. Roberson*, 486 U.S. at 680 (reiterating that "ease and clarity of application" is a "'principal advantage[]'" of *Miranda*). The "bright-line" nature of the *Miranda* scheme has the virtue of clearly informing officers of the specific restrictions placed upon them by the Fifth Amendment and of clearly informing judges of the circumstances that determine admissibility. See *Minnick v. Mississippi*, 498 U.S. at 151; *Arizona v. Roberson*, 486 U.S. at 681. The guidance provided enables officers to avoid conduct that can jeopardize constitutional rights and undermine investigations, see *Davis v. United States*, 512 U.S. at 461, and enables the courts to "conserve judicial resources." *Minnick v. Mississippi*, 498 U.S. at 151.

The Court has "repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards*," and has sought to develop standards to govern invocations of counsel that "serve[] the purpose of providing 'clear and unequivocal' guidelines." *Arizona v. Roberson*, 486 U.S. at 681-682. In cases involving significant invocation of counsel issues, uncertain, ill-defined standards have been rejected because they could have resulted in reductions of "clarity and ease of application," *Davis v. United States*, 512 U.S. at 461, could have "spread confusion through the justice system[,]" and could have led "to a consequent loss of respect for the underlying constitutional principle." *Minnick v. Mississippi*, 498 U.S. at 155.

The clearest reasonable alternative in situations involving initiations by officers following unequivocal requests for assistance is a rule that initiation by the suspect is not legally possible during the same custodial interrogation–*i.e.*, a rule that precludes the option of "curing" *Edwards* violations. This approach would inform officers that

once they fail to honor a suspect's request, the only circumstance in which they may proceed with interrogation would be with counsel present. A contrary holding–a conclusion that officers can violate *Edwards* and then cure their transgressions–would require a delineation of standards for judging whether sufficient curative steps have been taken. As will be seen below, it is *possible* to devise such standards. However, any standards capable of furthering the purposes of the *Edwards* doctrine effectively would inevitably inject ambiguity and uncertainty, spreading confusion that would undermine the goals of providing officers and courts with guidance and conserving judicial resources. This Court should preserve the bright-line character of the *Edwards* doctrine by declaring, once again, that initiation by an officer precludes further interrogation without counsel.

C. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule Will Invite Circumvention Of The Essential Safeguards Provided By That Rule

From long before *Miranda* until the present, the Court has devoted considerable effort to developing legal standards that ensure that efforts to obtain and introduce confessions do not threaten fundamental constitutional liberties. In part because of an understandable desire to protect society from crime and in part because of resistance to the constitutional constraints imposed by the Court's rulings, see *Missouri v. Seibert*, 124 S.Ct. at 2608, 2613, law enforcement agents have sometimes sought to circumvent those constraints. Some legal standards invite evasion. *Miranda* itself was in part a response to official exploitation of the malleability and indefiniteness of the Due Process-coerced confession doctrine. Because of the fact-specific, totality-of-the-circumstances nature of that doctrine, officers and courts who were so inclined could almost always distinguish a particular case from any of the Court's precedents. Moreover, just last term, the Court

acknowledged that in response to *Oregon v. Elstad*, 470 U.S. 298 (1985), law enforcement agencies had developed a "question-first" technique whose very purpose was "to circumvent *Miranda v. Arizona*." *Missouri v. Seibert*, 124 S.Ct. at 2614 (Kennedy, J., concurring in the judgment).

This Court has recognized the likelihood that officers will be tempted to "bypass proper procedures" as dictated by the *Edwards* doctrine, see *Arizona v. Roberson*, 486 U.S. 688 n. 7, and has been influenced by the fact that "pressures" and "abuses . . . may be concomitants of custody." *Minnick v. Mississippi*, 498 U.S. at 153. Unless there is very good reason, the Court should avoid interpretations of *Edwards* that invite exploitation and circumvention by "officer[s] engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). There is very little, if any, reason to authorize officers to "cure" improper initiations of communications in disregard of suspects' requests for counsel, yet the option of "cure" will undoubtedly tempt many to ignore *Edwards*'s constraints and endeavor to lure suspects into retracting expressed wishes for assistance. Officers who fear that a suspect will not change his mind on his own, at least not before the formal processes of prosecution inject counsel into the equation, will see the possibility of cure as an opportunity to prompt the suspect to say something. When officers learn that they can undo their own wrongs, a fair number will predictably exploit the opportunity.[6]

---

6. An officer's subjective intention is not relevant to determining whether she has complied with *Miranda*. See *Missouri v. Seibert*, 124 S.Ct. at 2612 n.6 (plurality opinion); *id.* at 2617-19 (O'Connor, J., dissenting). Consequently, the strong temptation to deliberately ignore requests for counsel provided by the "cure" option will not be counteracted by fear that improper motives will count against a "cure" finding. The violations that

(continued...)

Official disregard of constitutionally-rooted safeguards can only frustrate the purposes of those safeguards and erode respect for the underlying constitutional guarantee. Standards that tempt and are likely to induce officers to ignore *Miranda*'s protective scheme and exploit opportunities to take advantage of vulnerable suspects will surely undermine the importance and acceptance of that scheme. To forestall another wave of deliberate, corrosive disrespect for *Miranda*'s constitutional rules–a wave similar to the one that precipitated *Seibert*–the Court should deny the possibility of "cure."

D. The Balance of Interests At Stake Does Not Justify The Conclusion That *Edwards* Violations Are Curable

The "concerns underlying the *Miranda* . . . rule must be accommodated to other objectives of the criminal justice system." *United States v. Patane*, 124 S.Ct. at 2631 (Kennedy, J., concurring in the result). Put otherwise, in interpreting *Miranda*'s "preventative" scheme, it is "essential" to "strike[] an appropriate balance" between "the suspect's freedom from coercion" and "legitimate law enforcement" interests. *Arizona v. Roberson*, 486 U.S. at 691 (Kennedy, J., dissenting). Such interest balancing has informed the Court's resolution of a variety of *Miranda* issues. See, e.g., *New York v. Quarles*, 467 U.S. 649 (1984); *Harris v. New York*, 401 U.S. 222 (1971).

The weighty interests on one side of the scale have already been discussed. A rule permitting officers to cure *Edwards* violations heightens the risks that vulnerable suspects will be compelled to confess and that the introduction of those confessions will result in Fifth Amendment violations.

---

6. (...continued)
officers will seek to cure will include both innocent errors and deliberate disregards of the *Edwards* rule.

Moreover, a "cure" alternative would "muddy[] *Miranda*'s otherwise relatively clear waters," *Moran v. Burbine*, 475 U.S. 412, 425 (1986), and would provide potent incentives to evade the critical safeguards afforded by the *Edwards* rule. Consequently, the *Miranda* doctrine should be construed to permit cures *only* if a refusal to dilute *Edwards* by allowing cure would defeat legitimate and substantial law enforcement interests.[7]

Law enforcement interests in obtaining voluntary admissions are more than adequately served by the current doctrine. A rule that would allow cures of *Edwards* violations would promote legitimate interests marginally, if at all, while inflicting substantial harm on constitutional liberties. First, *Edwards*, itself, *expanded* the opportunities to obtain admissions following an invocation of the right to counsel. *Miranda* had rigidly declared that after a request for counsel, "the interrogation must cease *until an attorney is present*." 384 U.S. 436, 474 (1966) (emphasis added). The *Edwards* Court broadened law enforcement authority by permitting interrogation absent counsel whenever a suspect initiates communications and waives his rights. Second, officers are constrained by the *Edwards* prohibition *only* in the limited number of cases in which suspects *clearly and unambiguously* request counsel. *Davis v. United States*, 512 U.S. 452 (1994). Moreover, even in this small subset of cases, officers are not barred from securing admissions of guilt. They may

---

7. This is not a case in which there is a need to justify an "extension" of the protections afforded by *Miranda*. The approach proposed by the State–allowing officers to violate the law, then cure their transgressions–would *contract* the bright-line, systemic protection already afforded by *Edwards* by according officers yet another opportunity to conduct custodial interrogation outside the presence of counsel. Consequently, this case bears similarity to *Minnick v. Mississippi*, 498 U.S. 146 (1990), a decision refusing to shrink *Edwards*'s protection by allowing officers to initiate interrogation following consultation with counsel.

interrogate if the suspect on his own initiative evinces a willingness to discuss the investigation and waives his rights, *Minnick v. Mississippi*, 498 U.S. at 156, and they may interrogate in the presence of counsel. *Id.* at 152-53. And even if the suspect does not initiate communications and counsel is not present, they may interact with the suspect in any way that does not rise to the level of interrogation. *Edwards v. Arizona*, 451 U.S. at 486; *see, e.g.*, *Rhode Island v. Innis*, 446 U.S. 291 (1980).

If the Court rejects the possibility of cure, the only instances in which statements will be excluded are the undoubtedly small number of cases in which officers, within the same custodial interrogation, ignore clear requests for counsel, initiate communications, and then conduct interrogations. In those cases, the suppression of a suspect's admissions is amply justified by an appropriate balance of interests.[8]

To give substance to *Miranda*'s dictates, the *Edwards* doctrine "insist[s] that neither admissions nor waivers are effective unless there are both *particular and systemic assurances* that the coercive pressures of custody were not the inducing cause." *Minnick v. Mississippi*, 498 U.S. at 155 (emphasis added). Occasionally, the systemic assurances necessary to prevent unacceptable risks of compelled self-incrimination at trial will lead to the exclusion of a voluntary

8. In striking the balance, the severe limitations on the scope of exclusion under *Miranda* must also be taken into account. The absence of a fruit-of-the-poisonous tree doctrine, see *United States v. Patane*, 124 S.Ct. at 2620 (2004), and the availability of impeachment use of a suspect's statements even when his request for counsel has been dishonored, see *Oregon v. Hass*, 420 U.S.714 (1975), weigh heavily on the government's side of the balance, supporting the contention that law enforcement interests are adequately served by the current doctrine.

statement. This cost is offset, and justified, by the numerous instances in which the same systemic assurances exclude a compelled confession that would not be identified by a case-by-case approach.[9] In the context at issue here, the minor harm to law enforcement interests caused by denying the "cure" option is clearly counterbalanced by substantial gains in protecting the constitutional rights of the most susceptible suspects. The current doctrine, without a "cure" option, already affords generous opportunities for law enforcement to obtain uncoerced cooperation from those suspects. *Davis v. United States*, 512 U.S. at 461 (the *Edwards* prohibition does not "unduly hamper[] the gathering of information"). The availability of a cure alternative would skew the balance, tipping it decidedly in favor of law enforcement interests.

In this case, it is indisputable that the suspect was subjected to one, continuous custodial interrogation. Once the authorities initiated communications with him, he was not subject to further interrogation unless counsel was present. Because he was interrogated in the absence of counsel, the conclusion that his statements were inadmissible was clearly correct and should be affirmed.

II. IF VIOLATIONS OF THE *EDWARDS* PROHIBITION ARE DEEMED CURABLE DURING THE SAME CUSTODIAL INTERROGATION, ONLY MEASURES THAT CLEARLY ELIMINATE THE RISKS GENERATED BY OFFICIAL INITIATION SHOULD SUFFICE

9. Denial of an opportunity to "cure" official initiations would not "transform the *Miranda* safeguards into wholly *irrational* obstacles to *legitimate* police investigative activity." *Michigan v. Mosley*, 423 U.S. 96, 102 (1975)(emphasis added). Instead, allowing cure would lower a rational barrier to illegitimate conduct likely to generate compulsion to speak.

The balance of pertinent interests militates powerfully against the "cure" option advocated by the State. If the Court is nonetheless persuaded that officers should be able to remedy their own wrongs, the same reasons that support outright rejection of the "cure" alternative dictate adoption of a demanding standard for determining whether officers have taken sufficient curative steps. A weak, toothless standard would engender unacceptably high risks of conviction based on compelled statements and would be unfair in light of the demand that a suspect must unambiguously ask for counsel to merit the protection of *Edwards*.

As already noted, the *Edwards* rule is designed to prevent officers from "badgering" vulnerable suspects into waiving their rights and submitting to questioning without counsel. Officer-initiated interrogation after a clear request for counsel is forbidden because it "will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Arizona v. Roberson*, 486 U.S. at 686. The concern is that answers given in such circumstances will be the product of compulsion and that their admission into trials will violate the Fifth Amendment privilege.

A suspect who has seen and heard officers disregard a clear request for assistance is likely to feel that the entitlement to counsel is meaningless and that the authorities–those with power to control his fate–desire, indeed, are determined, to question him without assistance. Put simply, the psychological impact of repeated approaches on an individual who has unambiguously evinced his incompetence and vulnerability is likely to be devastating. Steps taken at that point to counteract the message conveyed by the initiation are quite unlikely to restore the *status quo ante–i.e.*, to put the suspect in the position he was in immediately after his request. If anything, efforts to contradict the impression created by official

initiation are likely to confuse and unsettle a needy suspect.[10]

The logic that underlies the *Edwards* prohibition suggests that cures should be possible, if at all, *only* when the government shows post-initiation measures or events that clearly eliminate the psychological impact and heightened risks of compulsion generated by an officer's improper conduct. The law should demand not only a clear negation of the message delivered, but also proof that there was *no* causal connection between the officer's initial conduct and the suspect's willingness to discuss the investigation. Assuming an objective standard is appropriate, cure should be found *only* if it is established that a reasonable person in the suspect's position[11] *clearly would not have been influenced or prompted to initiate communications by the officer's earlier initiation.* A less stringent standard would invite the very risks that *Edwards* was designed to combat.

Moreover, a demanding standard such as that suggested is fair and even-handed. After all, the only reason that a cure is required is the government's failure to abide by (or deliberate defiance of) the clear, simple dictates of the *Edwards* rule. A demand for a clear showing that there is no connection between the officer's impropriety and the suspect's conduct–*i.e.*, that the suspect's desire to talk was not influenced by the officer's expressed wish to interact without a lawyer present–is needed to inform the law enforcement community that the *Edwards* prohibition is important and must be respected. Only a stringent standard can motivate a

---

10. These are additional reasons why rejection of the possibility of "cure" is by far the preferable approach.

11. At the very least, evident characteristics of the suspect and of his situation–*e.g.*, his age, the time of day–should be taken into account in assessing the suspect's position.

desirable level of compliance. In addition, a suspect must be clear in expressing his desire for counsel and cannot gain the shelter furnished by *Edwards* unless he avoids all ambiguity. *Davis v. United States*, 512 U.S. at 459. To protect a suspect who has satisfied this demanding invocation standard, it is only fair to require the government to show that he was clearly not influenced by official initiation and decided, entirely on his own, to change his mind about the need for assistance.[12]

When the facts of this case are measured against an appropriately demanding standard, it is clear that the Court of Appeals correctly rejected the government's claim that the *Edwards* violation in this case was cured. The Maryland courts found a psychological connection between what Officer Reese said and the juvenile suspect's inquiry whether he could "still" talk to the police. Moreover, the State did not show that a reasonable suspect in Blake's position clearly would not have been influenced or prompted by the official conduct in violation of *Edwards*. The sole fact relied upon by the State–that Detective Johns reacted negatively to his colleague's improper statement–was patently inadequate to

12. No effort is made here to catalogue *all* of the factors that might be relevant to deciding whether the proposed standard has been satisfied. The time between the official initiation and the putative suspect initiation is potentially pertinent, though a long lapse alone should hardly suffice in light of the increased pressure generated by prolonged custody. *Minnick v. Mississippi*, 498 U.S. at 153. Statements made directly to the suspect are also potentially relevant, but care should be taken to ensure that further communications by the authorities do not exacerbate the situation. After all, to a suspect who has heard officers initiate the dialogue, a statement admitting error and reiterating that the choice to be questioned without counsel is the suspect's might well intensify the feeling that the authorities, in fact, desire to question him without counsel. The difficulty of specifying appropriate factors and the uncertain impact of any subsequent event or conduct provide additional reasons not to allow cures at all.

eliminate the heightened risks of compulsion in this case.[13]

III. UNDER ANY DEFENSIBLE STANDARD FOR DETERMINING WHETHER THE IMPACT OF AN IMPROPER OFFICIAL INITIATION HAS BEEN ELIMINATED, THE RECORD BELIES THE POSSIBILITY THAT THE GRATUITOUS AND COERCIVE VIOLATION OF THE *EDWARDS* RULE WAS CURED

Under either of the approaches already proposed for resolving the issue raised by this case, the conclusion of the Court of Appeals must be affirmed. It would be a serious mistake to adopt a more lenient standard for evaluating whether curative measures are sufficient. Nonetheless, the facts of this case are so egregious that no finding of cure is possible under even the least stringent of tests.

The State contends that the appropriate approach is one that looks to the totality of the circumstances, see Brief for Petitioner at 10, 19, to determine whether "curative measures and other intervening factors . . . show that the police honored the suspect's choice whether to speak, and [that] the suspect changed his mind." *Id.* at 10. Alternatively, the State suggests that the proper inquiry is whether the police "conveyed" or "made it clear" to the suspect "that the police intended to honor his choice to communicate with them only through counsel." *Id.* at 28, 30. The totality nature of this determination would seriously undermine *Miranda*'s goal of providing clear, bright-line guidance for officers and courts. More important, the proposed approach is insufficiently

13. Moreover, as will be seen below, Johns's conduct in delivering the erroneous charging statement to Blake, emphasizing the seriousness of the charges, and informing Blake that he needed to read the document constituted additional, highly coercive, uncured initiation by the authorities.

demanding in light of the fact that it is designed for cases in which an avowedly vulnerable suspect has already seen his request for counsel dishonored by the authorities. Because the police have already shown the suspect that they *do not* intend to respect his request, only a showing that the suspect clearly was unaffected by the official impropriety should suffice.

Even under the State's dangerously permissive standard, the record in this case cannot support a cure finding. The undisputed facts fall well short of establishing that the police "honored" Blake's choice not to deal with the authorities at any point in the process. The lower courts did not find, and, indeed, it would have been irrational to find, that the authorities made it "clear" to Blake that "they intended to honor his choice to communicate with them only through counsel." Instead, the Maryland courts rejected the claim that the official impropriety was cured and concluded that Blake's supposed "initiation" was "'in direct response to'" the "coercive" conduct of the police.[14] *Blake v. State*, 381 Md. 218, 238-39, 849 A.2d 410, 422 (2004). The fact findings and legal conclusions of the lower courts are unimpeachable on this record.

At the outset, the backdrop for the events in this case must not be overlooked. Respondent was a 17-year-old juvenile who was taken from his home in the early morning hours. While still in a state of undress that could only have increased his vulnerability, he was placed in a holding cell. He then clearly informed the authorities that he was incapable of

14. This includes both the judge who ruled on the suppression motion and the Court of Appeals. The intermediate Court of Special Appeals erroneously reversed for lack of interrogation, not because the respondent's question was independent of the officer's initiation of communications. Consequently, the State's position finds no support in the record or in *any* of the three lower court rulings.

dealing with them without legal assistance.

Next, the nature of the "official initiation" that occurred must be taken into account. Officers returned to Blake's holding cell a mere thirty-five minutes after he had asked for counsel. One officer handed him the charging document and emphasized that the charges were serious and that he needed to read and understand them. Along with an erroneous description of the penalty for the offense as "DEATH," the papers informed Blake that his cohort had made a statement blaming him for the murder. In conjunction with the delivery of the document, Officer Reese, who had no legitimate reason for being present, directed toward Blake a gratuitous, "loud and confrontational" remark, saying "'I bet you want to talk now, huh!'" *Id.* at 224, 849 A.2d at 413.[15]

Accurate description of the specific *Edwards* violation that occurred is important. One cannot sensibly decide whether officers have "cured" the harm of their improper initiation unless the nature of that initiation and the magnitude of that harm are identified. Clearly, it should be harder to eliminate the psychological effects of a particularly coercive official initiation. It should be much more difficult to counteract a potent message of disrespect for a suspect's clear request for counsel. The State's portrayal of the initiation that occurred misleadingly suggests that it consisted of a simple, "unexpected comment," Brief for Petitioner at 3, and that it was a mere improper "remark," *id.* at 7, and a "single impropriety." *Id.* at 19. In fact, the initiation of communications in this case was at the opposite end of the spectrum. Officer Reese's uncalled for statement alone sent an

15. The State punctuates this "statement" with a question mark. See Brief for Petitioner at 3, 26. This implicit concession that Officer Reese asked Blake an express question seems correct, for the remark clearly was "interrogatory" in nature. *Blake*, 381 Md. at 236, 849 A.2d at 420.

undeniably powerful message of disrespect for Blake's declaration of incapacity and need. Loudly and confrontationally, and for no ostensible reason other than to provoke Blake, see *Blake*, 381 Md. at 235, 849 A.2d at 420, Officer Reese directly challenged him to respond to an accusation that appeared to carry the ultimate penalty and to a cohort's declaration that he was culpable. The psychological impact on Blake must have been devastating.

Furthermore, Officer Reese's charged remark was not the only official impropriety. Detective Johns delivered a charging document that erroneously informed Blake that he was facing death and accurately apprised him of a cohort's effort to place the blame on him. He emphasized that the charges were serious and that Blake needed to read them. If Detective Johns had simply decided, on his own, to inform Blake orally that he was charged with murder, that the penalty was death, and that his cohort had accused him, he would unquestionably have been held responsible for "initiating" communications. Neither the fact that the communication here was in writing nor the fact that state law required a defendant to be served with the document should alter that conclusion. The impact on a vulnerable suspect would be identical in both cases. And surely state law cannot authorize and immunize conduct that generates intolerable risks of Fifth Amendment violations.[16] When combined with Officer Reese's challenge, the delivery of the charging document constituted an extremely

16. Even if there was a state interest served by promptly and accurately informing a suspect of the simple nature of the charges he is facing, there would be no need to include more than the bare details. It is hard to imagine what legitimate state interest is served by including a cohort's accusatory statement. More important, once a suspect has asked for counsel, all such information can be promptly conveyed to him *through* counsel. See *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (White, J., concurring).

coercive initiation of communications with overwhelming psychological impact.[17]

Even if some *Edwards* violations can be remedied, it is arguable that an infection of the process as virulent as the one injected here is incurable. At the very least, a poison this potent requires an exceptionally strong antidote. It is inconceivable that the measures taken in this case sufficed, and, indeed, the lower courts properly found that they did not. The State's cure contention, in fact, rests entirely on a single fact–Detective Johns's response to Officer Reese's comment. Under any rational cure standard, that action is scarcely capable of the heavy lifting the State would have it perform. Viewed in context, it surely did not undo the damage done or eliminate the risks created by the officers' coercive initiation. The situation, of course, must be viewed from the viewpoint of the suspect. *Arizona v. Roberson*, 486 U.S. at 687 ("*Edwards* focuses on the state of mind of the suspect and not of the police"). From Blake's standpoint, or the vantage point of any reasonable person in his position, Officer Johns's negative response to Officer Reese could not have restored the *status quo ante*. It did not nullify the very loud and very clear message that the authorities were determined to deal with him without counsel. A contrary contention strains credulity.

First, Detective Johns's actions were directed toward Officer Reese alone. He addressed no potentially remedial

17. The lower courts implicitly recognized the potent nature of the conduct in this case by concluding that Officer Reese's statement was not merely the initiation of communications under *Oregon v. Bradshaw*, but was also official *interrogation* within the meaning of *Rhode Island v. Innis*. *Blake*, 381 Md. at 235-36, 849 A.2d at 420. The Court of Appeals concluded that the presentation of the charging document alone was not *interrogation*, but did not conclude that that conduct did not constitute post-invocation *initiation*. See *Blake*, 381 Md. at 236, 849 A.2d at 420.

comment toward Blake. Interaction with another officer is much less likely to have an impact on a bystander suspect. See *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980) (fact that remarks were addressed to another officer, not to the suspect, counted against a finding of "interrogation"). It is possible that Johns's reaction had some marginal ameliorative effect. On the other hand, considering all of the circumstances, a vulnerable suspect like Blake is just as likely to have been confused, disoriented, or to have felt even more pressure after witnessing Johns's reaction to Reese.[18]

In addition, Detective Johns returned to Blake's cell after a mere twenty-eight minute break. Time could be a relevant factor in dissipating the psychological effects of official initiation. A lengthy hiatus after a genuine, substantial curative measure might weigh in favor of cure.[19] The short time period in this case–the fact that Officer Johns was back at Blake's cell soon after he had heard and seen powerful indications that the authorities wished to speak to him without counsel–should count against the possibility that a cure occurred. The detective's quick return in the absence of counsel precludes a finding that the pressure brought to bear on Blake had dissipated. Blake's inquiry whether he could

18. The conduct of Officer Reese and Detective Johns smacks of the "Mutt and Jeff" routine described in *Miranda*. See 384 U.S. at 452. This is not meant to suggest that the officers planned the episode or that Detective Johns's reaction was insincere. The point is merely that to any suspect who had been confronted by Reese and had seen the charging document (much less a 17-year-old murder suspect, arrested in the early morning hours, alone in a jail cell, still clad in underwear) Johns's statement that because Blake had asked for a lawyer the officers could not talk to him might well have been perceived as a further reflection of the officers' *desire* to interrogate him in the absence of counsel.

19. On the other hand, pressure to submit can grow as custody is prolonged. See *Minnick v. Mississippi*, 498 U.S. at 153.

"*still* talk" to the officer suggests an understandable perception that the two visits to his cell were part of one continuous process designed to secure his cooperation in the absence of counsel. See *Blake*, 381 Md. at 239, 849 A.2d at 422.

The undisputed facts belie any finding that Blake's inquiry was a product of an unprovoked, voluntary change of heart regarding counsel. It was clearly a response to the improper initiations that had occurred. The State's suggestion that Blake's inquiry was not the product of Officer Reese's statement, but was instead an independent initiation of communications is patently contrary to the fact finding of the suppression court, see *Blake*, 381 Md. at 227, 849 A.2d at 415, and to the appellate court's conclusion that this finding was not clearly erroneous.[20] In addition, the State *concedes* that Blake's inquiry was the product of reading the content of the erroneous charging document. Brief for Petitioner at 10, 27. The police took not a single step to counteract the powerful effects of falsely informing Blake that he faced "DEATH" or of confronting him with his cohort's accusation. Blake's question undoubtedly was the result of the State's unjustified and potent pressures to submit to questioning without a lawyer's help. The reaction of Detective Johns to Officer Reese could not and did not cure the unjustifiable, coercive, and compound *Edwards* violation in this case.

The case for finding that the police cured their *Edwards* violation here is exceedingly weak. A conclusion that the harm of the official improprieties was undone and that the significant constitutional risks engendered were eliminated could be based only on an unduly permissive legal standard for assessing cure or on an indefensible disregard of the

20. Blake responded to the earlier actions and to the charging document at the earliest opportunity he had to do so. See *Blake*, 381 Md. at 227, 849 A.2d at 415 (reporting conclusion of Circuit Court judge).

uncontroverted facts and fact finding. Because the balance of interests in this particular case overwhelmingly favors the respondent, the Court of Appeals properly concluded that no "cure" was effected and that Blake did not initiate communications after he clearly requested a lawyer.[21]

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

Of Counsel:
Joshua L. Dratel
Co-Chair, NACDL Amicus Committee
1150 18th Street, N.W.-Suite 950
Washington, D.C. 20036
(202) 872-8600

James J. Tomkovicz
Counsel of Record
University of Iowa College of Law
Iowa City, Iowa 52242
(319) 335-9100

Dated: August 1, 2005

---

21. The State accuses the appellate court of an improper "fruits" analysis and of inappropriately "penalizing police error." Brief for Petitioner at 29, 31. These criticisms are far from the mark. At issue in this case are the *statements* made as a *direct result* of an *Edwards* violation, *not* evidence *derived from* such statements. The appellate court's conclusion that Blake's inquiry was the product of the official initiation is a substantive *Miranda* law determination involving no "fruits" analysis whatsoever. Moreover, the decision below showed no concern with penalizing officers, but, rather, was directly concerned with excluding statements that were presumptively compelled and threatened to violate the Fifth Amendment if used in the courtroom.

Supreme Court, U.S.
FILED
AUG 5 - 2005
OFFICE OF THE CLERK

(10)

No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

LEEANDER JAMES BLAKE,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR RESPONDENT

JEFFREY T. GREEN
MATTHEW J. WARREN
ANDREW D. FAUSETT
JENNIFER B. TATEL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

KENNETH W. RAVENELL*
IVAN J. BATES
MATTHEW A.S. ESWORTHY
SCHULMAN, TREEM, KAMINKOW, GILDEN & RAVENELL, P.A.
THE BALTIMORE INNER HARBOR WORLD TRADE CENTER
SUITE 1800
401 EAST PRATT STREET
BALTIMORE, MD 21202-3004
(410) 659-0111

Counsel for Respondent

* Counsel of Record

August 5, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a suspect initiated discussions with police within the meaning of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), where, after the suspect invoked his right to counsel, police interrogated him by disparaging his decision to consult counsel, where the only remedial action taken was a statement by one officer to another officer, and where the trial court found as a matter of fact that the suspect's statement was made in response to unlawful police interrogation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE *EDWARDS* RULE PROTECTS CRITICAL FIFTH AMENDMENT VALUES	11
II. THE TRIAL COURT'S FACTUAL FINDINGS DEFINITIVELY ESTABLISH THAT MR. BLAKE DID NOT REINITIATE INTERROGATION	15
III. EVEN CONSIDERED *DE NOVO*, DETECTIVE JOHNS'S STATEMENT CLEARLY DID NOT "CURE" THE *EDWARDS* VIOLATION	20
A. Effective Curative Measures Must Ensure That A Suspect's Decision To Reinitiate Was Independent Of The Unlawful Interrogation	20
B. Detective Johns's Statement Is Not An Effective Curative Measure	23
1. An *Edwards* violation cannot be cured by a mere repetition of *Miranda* rights	23
2. Detective Johns's statement to Officer Reese did not negate the coercive effect of Reese's unlawful interrogation	27
CONCLUSION	31

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Arizona v. *Roberson*, 486 U.S. 675 (1988) ..... *passim*
Dickerson v. *United States*, 530 U.S. 428 (2000) ... 17
Dunkins v. *Thigpen*, 854 F.2d 394 (11th Cir. 1988) 22
Edwards v. *Arizona*, 451 U.S. 477 (1981) ..... *passim*
Hill v. *Brigano*, 199 F.3d 833 (6th Cir. 1999)..... 22
Holman v. *Kemna*, 212 F.3d 413 (8th Cir. 2000).... 16
James v. *Arizona*, 469 U.S. 990 (1984)..... 11
Johnson v. *Zerbst*, 304 U.S. 458 (1938)..... 13
McFadden v. *Garraghty*, 820 F.2d 654 (4th Cir. 1987) 22
McNeil v. *Wisconsin*, 501 U.S. 171 (1991)..... 22
Michigan v. *Mosley*, 423 U.S. 96 (1975) 14, 21
Minnick v. *Mississippi*, 498 U.S. 146 (1990)..... 12, 24
Miranda v. *Arizona*, 384 U.S. 436 (1966)..... 11, 21, 24, 28
Missouri v. *Siebert*, 124 S. Ct. 2601 (2004)..... *passim*
Oregon v. *Bradshaw*, 462 U.S. 1039 (1983)..... 7, 13, 16
Oregon v. *Elstad*, 470 U.S. 298 (1985)..... 24, 25
Palaggi v. *Chrans*, 221 F.3d 1339 (7th Cir. 2000), *available at* 2000 WL 1055789 16
Patterson v. *Illinois*, 487 U.S. 285 (1988) 21, 24
Rhode Island v. *Innis*, 446 U.S. 291 (1980)..... 7, 20, 30
Smith v. *Illinois*, 469 U.S. 91 (1984)..... 11, 12
United States ex rel. Espinoza v. *Fairman*, 813 F.2d 117 (7th Cir. 1987), *overruled on other grounds by United States* v. *LaGrone*, 43 F.3d 332 (7th Cir. 1994)..... 22
United States v. *Barlow*, 41 F.3d 935 (5th Cir. 1994) 22
United States v. *Geittmann*, 733 F.2d 1419 (10th Cir. 1984)..... 22
United States v. *Gomez*, 927 F.2d 1530 (11th Cir. 1991)..... 8, 13, 16

TABLE OF AUTHORITIES – continued

Page

United States v. *Harris*, 221 F.3d 1048 (8th Cir. 2000)..... 22
United States v. *Michaud*, 268 F.3d 728 (9th Cir. 2001)..... 16
United States v. *Skinner*, 667 F.2d 1306 (9th Cir. 1982)..... 22
United States v. *Whaley*, 13 F.3d 963 (6th Cir. 1994)..... 16

STATUTE

Md. Code Ann., Crim. Law § 2-202(b)(2)(i) 2

RULE

Md. R. 4-212(e)..... 1

SCHOLARLY AUTHORITY

Charles D. Weisselberg, *In the Stationhouse after Dickerson*, 99 Mich. L. Rev. 1121 (2001)..... 30

STATEMENT OF THE CASE

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court created a rule designed to preserve the integrity of a suspect's choice to deal with police through counsel: when a suspect requests counsel, all interrogation must cease unless the suspect reinitiates communication voluntarily and without prompting. In the present case, the Maryland Court of Appeals upheld the trial court's grant of respondent's motion to suppress by applying the straightforward *Edwards* rule to the facts before it: a suspect unequivocally requested counsel, was later illegally interrogated, and spoke to officers shortly afterward in response to that illegal interrogation. Having conceded that Mr. Blake was illegally interrogated, Petitioner nevertheless challenges the Court of Appeals' reasonable application of *Edwards* by completely ignoring the factual findings of the Maryland trial court and by proposing a gaping exception to the *Edwards* rule that would allow police to challenge a suspect's request for counsel with impunity so long as they punctuated their remarks with a reminder that the suspect retained the rights that the police just violated. Petitioner's attempt to relitigate the facts and to undermine *Edwards* should be rejected, and the judgment of the Maryland Court of Appeals should be affirmed.

1. In the early morning hours of October 26, officers of the Annapolis, Maryland police department obtained a warrant for Mr. Blake's arrest; the warrant was issued at 2:04 AM. JA 337-38. Shortly afterward, at 2:46 AM, the court that approved the warrant generated a statement of the charges against Mr. Blake, which included both the charges against Mr. Blake and the purported maximum possible penalty.[1] See *id.* at 329, 333. The first charge on the first page of the document was first degree murder of Straughan Griffin. See *id.* at 329. In all capital letters, the statement of

---

[1] Maryland Rule 4-212(e) requires police to provide a copy of this statement "promptly" after arrest.

charges claimed that Mr. Blake faced a penalty of "DEATH" for this offense. See *id.* This claim was patently false – as a juvenile, Mr. Blake was statutorily ineligible for the death penalty in Maryland. See *id.*; see also Md. Code Ann., Crim. Law § 2-202(b)(2)(i). The police were well aware that Mr. Blake was a juvenile; the birth date on the very same page of the statement of charges indicated that Mr. Blake had recently turned seventeen. See JA 329; see also *id.* at 30.

Later on the morning of October 26, at around 4:30 AM, a dozen police officers arrested Mr. Blake at his home. See JA 173. Mr. Blake was sitting on his couch watching cartoons on television when a team of police entered with guns drawn. See *id.* at 174-75. The police ordered Mr. Blake at gunpoint to lie on the floor and then arrested and handcuffed him. See *id.* at 175-76. Mr. Blake was wearing only boxer shorts and an undershirt. See *id.* at 176-77. Giving Mr. Blake no time to put on clothes or shoes, six or seven police officers forcibly removed him from his home. See *id.* at 177.

Officer Curtis Reese drove the police car that transported Mr. Blake to the Annapolis Police Department. See JA 178. Upon arrival at the police station, the police put Mr. Blake in an intake room. See *id.* at 47. Soon afterward, Detective William Johns arrived at the police station. See *id.* at 49. Detective Johns was the lead investigator on the Griffin case. See *id.* at 14-15. Johns read Mr. Blake his *Miranda* rights and provided a waiver form that outlined each right. See *id.* at 183. Mr. Blake immediately and unequivocally invoked his right to counsel, stating, "'I want a lawyer.'" See *id.* at 51, 183-84. Mr. Blake also indicated on the waiver form that he wished to consult with counsel. See *id.* at 183-84.

In response to Mr. Blake's unequivocal invocation of his right to counsel, Detective Johns temporarily stopped the interrogation. JA 51. At around 5:25 AM, Mr. Blake was transferred from the intake room to a prison cell with a concrete floor. See *id.* at 57. Mr. Blake was left alone in the cold cell, still wearing only his underwear in the early

morning hours of a late October day. See *id.* at 356. Thirty-five minutes later, Officer Reese and Detective Johns returned to Mr. Blake's cell. See *id.* at 56. Reese accompanied Johns even though Reese had no role in the Griffin investigation. See *id.* at 53, 55. Johns was unable to offer any explanation as to why Reese came with him. See *id.* at 53, 55. Mr. Blake had not asked the police to return or indicated that he wished to resume discussions. See *id.* at 63-64, 356.

Detective Johns testified that he returned to Blake's cell to provide him a copy of the statement of charges. JA 56. Although the police had possession of Mr. Blake's charging papers before he was arrested at his home, the police had not yet provided them to Mr. Blake. *Id.* at 253. Instead, Detective Johns inexplicably waited until around 6:00 AM to show Mr. Blake the charging document. See *id.* at 56. When Detective Johns and Officer Reese entered the area of the cell, Johns approached Mr. Blake and handed him the charging papers. See *id.* at 187. Johns told Mr. Blake that they were "serious charges" and that he needed "to read [them] carefully" and "make sure he understood [them]." See *id.* at 23. Mr. Blake began reading the document, the first page of which erroneously stated in capital letters that he was facing the death penalty. See *id.* at 357. Mr. Blake did not respond to Johns's comments. See *id.* at 23. Johns then turned to leave. See *id.* at 23, 357.

While Mr. Blake was reading the statement of charges Officer Reese "yelled out," "'I bet you want to talk now, huh!'" JA 61, 187. Detective Johns claimed that he was surprised by Officer Reese's outburst, which even Johns described as having been made in a "somewhat confrontational" tone. See *id.* at 61. That Reese's challenge was confrontational in nature was confirmed by Detective Johns's further testimony that he had to "literally put my hands in front of me and walk[] Officer Reese back out of the cell block area." See *id.* at 23. While pushing Reese out of the holding cell, Johns said to Reese, "'No, he doesn't want to

talk to us. He already asked for a lawyer. We cannot talk to him now.'" See *id.* at 23, 67. Johns testified that he spoke very loudly to keep Reese from saying anything further and to avoid hearing anything Mr. Blake may have said in response to Reese's comments. See *id.* at 23-24. Johns knew that Reese was aware that Mr. Blake had invoked his right to counsel. See *id.* at 65. As a result, Johns testified that he was "extremely angry" with Reese's behavior and reported the incident to his supervisor, Sergeant Greg Kirchner. See *id.* at 239-40.

Detective Johns did not, however, say anything directly to Mr. Blake about Officer Reese's challenge. Johns did not remind Mr. Blake of his *Miranda* rights, inform Mr. Blake that he did not have to respond to Reese's challenge, apologize to Mr. Blake for Reese's illegal behavior, reassure Mr. Blake that his rights would be protected, or even inquire as to whether Mr. Blake had any questions about his rights in light of the violation. Nor did Johns do anything to correct the erroneous death penalty notice. In fact, it was *outside* the cellblock that Johns reminded Reese that the police could not "'reinitiate any kind of conversation with [Mr. Blake].'" JA 24.

After Detective Johns and Officer Reese left, Mr. Blake remained in his cell, where he "just shook" with fear. JA 187. Mr. Blake was alone and had been in the cold cell without clothes for an hour. See *id.* at 363. There was no one to tell Mr. Blake that he still had a right to counsel or that the putative punishment of "DEATH" was erroneously written on the statement of charges. No police officer attempted to get Mr. Blake an attorney. See *id.*

Less than half an hour later, at 6:28 AM, Detective Johns again returned to Mr. Blake's cell.[2] JA 68-69. Mr. Blake had

[2] Although there was differing testimony at the motions hearing as to whether Detective Johns had visited the holding cell again between 6:00 AM and 6:28 AM, JA 25, 189, the trial court accepted Detective Johns' testimony that he did not. *See id.* at 360 ("The police left the cellblock area immediately after Reese made that statement. . . . [and] until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them.").

not yet had a chance to respond to Officer Reese's challenge. See *id.* at 363. Responding to that challenge, Mr. Blake said, "I can still talk to you?" See *id.* at 359-60, 26, 192. Johns asked Mr. Blake whether he was asking to talk. See *id.* at 26. Mr. Blake said that he was. See *id.* Johns then took Mr. Blake to the same intake room where he was earlier that morning. See *id.* at 27. At no time did Johns advise Mr. Blake that the death penalty notice was erroneous, and at no time did Johns ask Mr. Blake why he asked to talk to him. See *id.* at 71. The interrogation resumed, and Mr. Blake eventually made the statements that were the subject of the motion to suppress. See *id.* at 32-33, 38-39.

2. Mr. Blake was indicted on charges relating to the Griffin homicide. Before trial, he moved to suppress the statements he made during his interrogation on the grounds that they were obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which holds that police interrogation must cease as soon as a suspect requests counsel, and that any statements made during custodial interrogation by a suspect who has requested counsel are inadmissible, unless the suspect reinitiated communication with police.

On May 9 and May 16, 2003, the Circuit Court of Anne Arundel County held a hearing on Mr. Blake's motion to suppress his statements. Mr. Blake's testimony and Detective Johns's testimony largely corroborated each other's account; both men testified that Mr. Blake had initially requested counsel, and both men testified that Officer Reese had yelled "'I bet you want to talk now'" after Detective Johns gave Mr. Blake the statement of charges. JA 61, 187. Mr. Blake also testified about the reasons he spoke to Detective Johns after Officer Reese's outburst. Mr. Blake explained that the primary reason he approached Johns was because of "what

Office[r] Reese said to me, 'I bet you want to talk now, huh!'" *Id.* at 192. In addition, Mr. Blake was influenced by the charge sheet that Reese had referenced; he testified that "I saw my charges and saw I was facing death." *Id.*

Officer Reese told a much different story, however. Reese claimed that he went to Mr. Blake's cell by himself (not with Detective Johns) and that while Reese was there Mr. Blake had spontaneously asked to speak with detectives. See JA 141. Reese flatly denied that he had said "I bet you want to talk now" to Mr. Blake, *id.* at 161, and denied that Johns had pushed him out of the cellblock. See *id.* at 143-44.

The trial court specifically rejected Officer Reese's account and credited that of Detective Johns and Mr. Blake. JA 361-62. The court held that Officer Reese's statement was "interrogation . . . of a coercive nature" intended specifically to elicit a response. *Id.* The court noted two reasons why Reese's question was particularly coercive. First, the exclamation "suggests [Mr. Blake] should want to talk." *Id.* at 359. Second, by asserting that "now" Mr. Blake should want to talk, Reese "clearly refer[red]" to the statement of charges and its supposed death sentence. *Id.* "In other words, look at those charges, look at that penalty, and I'll bet you will want to talk." *Id.*

The trial court went on to find that Mr. Blake's subsequent question to Detective Johns ("I can still talk to you?") was made "in direct response to Reese's previous statement."[3] JA 359-60. The court therefore implicitly accepted Mr. Blake's testimony that his question was prompted by Reese's challenge. See *id.* at 191-92. The court noted that, because the officers left immediately after Reese's remark, Mr. Blake was unable to respond to the question until Johns returned. See *id.* at 360. And the court noted in particular that there

[3] While the transcript of the trial court's ruling reads "indirect response," JA 359-60, it is apparent from the context that the court actually said "in direct response."

was no significant lapse in time between Reese's interrogation and Mr. Blake's response. See *id.* at 366. Accordingly, the court granted the motion to suppress. See *id.*

3. Rather than proceed to trial without Mr. Blake's statement, the prosecution chose to file an interlocutory appeal of the trial court's decision. On appeal, the Court of Special Appeals of Maryland reversed the trial court solely on the theory that Officer Reese's comment did not amount to interrogation under *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). JA 385-86, 388. The court found that Officer Reese did not expect Mr. Blake to respond and did not intend to elicit incriminating information. See *id.* at 388. Accordingly, the court found that the police action did not constitute unlawful interrogation.

The Court of Appeals of Maryland unanimously reversed the Court of Special Appeals and affirmed the trial court's grant of the motion to suppress. JA 419. The Court held that Officer Reese's challenge constituted the functional equivalent of interrogation following Mr. Blake's invocation of his *Miranda* rights, thereby violating Mr. Blake's right against compelled self-incrimination. See *id.* at 396. The Court held that "[w]hen the charging document was given to [Mr. Blake], containing a false statement of the law with respect to the penalty of death, it was accompanied by an officer's statement, which served no legitimate purpose other than to encourage petitioner to speak." *Id.* at 412-13.

Moreover, the Court of Appeals agreed with the trial court that Officer Reese improperly reinitiated contact with Mr. Blake. JA 413. Expressly tracking the analysis of *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality opinion), the Court of Appeals recognized that the "'dictionary sense'" of initiation is not coextensive with initiation in the *Edwards* sense. JA 415; see *Bradshaw*, 462 U.S. at 1045 (distinguishing between "the ordinary dictionary sense" of initiation and "the sense in which that word was used in *Edwards*").

And under the circumstances, the Court held that Mr. Blake had not reinitiated contact in the *Edwards* sense. Because Mr. Blake's comment, "Can I still talk to you?" was "'in direct response'" to Reese's impermissible interrogation, Mr. Blake did not independently reinitiate any contact. See JA 416.

The Court of Appeals considered and rejected the prosecution's argument that Detective Johns somehow cured the *Edwards* violation by reprimanding Officer Reese. JA 417. The Court noted that the trial court had found as a matter of fact that Mr. Blake's question to Johns was "in direct response" to Reese's interrogation and that Johns's statement did not cure Reese's unlawful interrogation. *Id.* The Court held that these factual findings were not clearly erroneous, particularly because the short time gap between Reese's comment and Mr. Blake's question indicated that Mr. Blake's statement was a continuation of the prior interrogation. *Id.* at 416-17. The Court, therefore, held that the trial court properly granted Mr. Blake's motion to suppress. See *id.* at 417-18.

Contrary to the assertion of the United States as *amicus*, the Court of Appeals did *not* hold that the police are incapable of curing *Edwards* violations absent a break in custody or a substantial lapse of time. See Br. of United States at 6-8. The United States's characterization of the Court of Appeals' decision is exclusively based on the Court of Appeals' description of *another court's decision*, specifically the Eleventh Circuit's decision in *United States* v. *Gomez*, 927 F.2d 1530 (11th Cir. 1991). See Br. for United States at 6-7; JA 418. The Court of Appeals never stated that it was adopting or relying on *Gomez*'s analysis, and certainly never held that *Edwards* violations could not be cured until a substantial amount of time had elapsed. Rather, the Court of Appeals' holding was a straightforward determination that – in this particular case – the trial court's ruling that Detective Johns's statements did not cure Officer Reese's illegal interrogation was not clearly erroneous. See *id.* at 417. The

Court of Appeals found the short break in time to be significant not because it was creating a "per se rule" as the United States claims, see Br. of United States at 8, but because the short break in time was a further indication that Mr. Blake's supposed initiation "was a continuation" of Reese's illegal interrogation. JA 417.

SUMMARY OF ARGUMENT

At bottom, this is a very simple case. It requires only a straightforward application of the rule of *Edwards* v. *Arizona* to a statement made by a suspect "in direct response" to illegal police interrogation. Petitioner attempts to obscure this fact by proposing to replace the *Edwards* rule with a freewheeling inquiry into the subjective coerciveness of concededly illegal interrogation, by blatantly mischaracterizing the opinion of the Maryland Court of Appeals, and by flatly ignoring the factual findings of the trial court. Petitioner's arguments are not well-founded and should be rejected.

The bright-line rule of *Edwards* provides critical protection of the right to counsel by requiring police to cease all custodial interrogations as soon as a suspect invokes his right to counsel and by proscribing any resumption of interrogation unless the suspect himself initiates a new encounter with officers. At the same time, the *Edwards* rule serves law enforcement interests by clearly delineating guidelines for police to conduct appropriate custodial interrogations. Although Petitioner pays lip service to the *Edwards* rule, it in fact proposes a significant revision to it. Instead of a bright-line rule excluding all statements made in response to post-invocation interrogation, Petitioner suggests that courts should weigh the coercive effect of particular *Edwards* violations to determine whether or not they constitute "badgering." Petitioner's approach would undermine the purpose and effectiveness of the *Edwards* rule, and it should be rejected.

Petitioner's suggestion that "curative measures" were not adequately considered in this case is simply wrong. The Maryland trial court considered Detective Johns's statement to Officer Reese and considered Petitioner's claim that it negated the effect of Officer Reese's challenge to Mr. Blake. But after hearing the testimony of the eyewitnesses and participants, the trial court found that Mr. Blake's statement to Johns was a response to Reese's challenge – just as Mr. Blake had testified.

The trial court's conclusion as to this historical fact should be reviewed on a clear error standard. But under any standard, the factual finding that Mr. Blake was responding to Officer Reese's challenge is well supported by the record and should be accepted. This factual finding moots Petitioner's speculative and subjective claims about the "curative effect" of Detective Johns's remonstrations to Officer Reese following Reese's illegal interrogation. By finding that Mr. Blake was responding to that illegal interrogation (as opposed to independently initiating a new conversation), the trial court necessarily found that Johns did not cure the effects of the illegal interrogation.

Even without these factual findings, Detective Johns's statement was far from adequate to cure the grave prejudice from Officer Reese's challenge. Any "curative measure" for an *Edwards* violation must be potent enough to counter the coercion from such a violation and restore the suspect to a position from which he can exercise a free choice to reopen dialogue. Here, the violation was particularly coercive, and the proffered cure was particularly weak. Reese directly challenged Mr. Blake's decision to ask for counsel and suggested that, because Mr. Blake was supposedly facing the death penalty, he ought to be talking to police. Detective Johns's reprimand of Reese did nothing to cure this challenge to Mr. Blake's decision to ask for counsel; indeed, by reemphasizing that it was Mr. Blake's choice to cut off questioning, Johns only added to the coercive effect.

ARGUMENT

I. THE *EDWARDS* RULE PROTECTS CRITICAL FIFTH AMENDMENT VALUES.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court recognized that custodial police interrogations are so inherently coercive that procedural safeguards are necessary to ensure that an individual's Fifth Amendment right against self-incrimination is protected. One such safeguard provides that if the accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444-45 (emphasis added). Interrogation "*must* cease until an attorney is present," at which time "the individual *must* have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474 (emphasis added).

This guarantee was refined further in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), where this Court held that all police interrogation must cease once an accused has invoked his right to counsel "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85. This Court has emphasized repeatedly that the "strict rule"[4] set forth in *Edwards* must be enforced because "the authorities through 'badger[ing]' or 'overreaching' – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (alteration in original). As the Court explained in *Arizona* v. *Roberson*, "to a suspect who ha[d] indicated his inability to cope with the pressures of custodial

---

[4] *James* v. *Arizona*, 469 U.S. 990, 993 (1984) (Brennan, J., dissenting from denial of petition for writ of certiorari).

interrogation by requesting counsel, any further interrogation without counsel having been provided w[ould] surely exacerbate whatever compulsion to speak the suspect may be feeling," 486 U.S. 675, 686 (1988). Thus, the purpose of the *Edwards* rule is to ensure that "any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990).

But while one purpose of the *Edwards* rule is to preserve the integrity of a suspect's request for counsel, *Edwards* has a second and equally important purpose – to provide a "'clear and unequivocal'" guide to courts and law enforcement that avoids subjective inquiries into the coercive effect of particular instances of badgering or overreaching. *Minnick*, 498 U.S. at 154; see *Roberson*, 486 U.S. at 681-83. By specifically informing officers as to what they may do during custodial interrogation, "*Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." *Minnick*, 498 U.S. at 151. *Edwards* is a bright-line rule that is ill-suited to the smudging and uncertainty of broad exceptions. See *Roberson*, 486 U.S. at 681 ("We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* . . . .")

The *Edwards* court defined a narrow and sensible exception to the rule it created that is in keeping with the purposes of *Edwards*. After an individual has asserted his right to counsel, any subsequent statements will be inadmissible unless the individual "(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith*, 469 U.S. at 95. The first prong of this standard – whether the accused initiated a new conversation with the police – is a simple factual question of whether "the accused, not the police, reopened the dialogue with the authorities." *Edwards*, 451 U.S. at 486 n.9.

If the accused did not reinitiate dialogue, then all post-invocation statements are inadmissible regardless of whether such statements were the product of actual coercion. *Id.* at 484-85. If the accused did reinitiate dialogue (and was not simply responding to post-invocation interrogation), then the Court applies the traditional waiver analysis of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), to determine whether the individual's waiver of his right to counsel was genuine or the product of actual coercion by the police. See *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1045 (1983) ("The inquiries are separate, and clarity of application is not gained by melding them together.").

Petitioner suggests that this clear and unequivocal rule should be replaced with a nebulous inquiry into "whether the police badgered the defendant and failed to honor the defendant's invocation of the right to counsel." Pet. Br. at 30. This suggestion is deeply flawed. The purpose of the *Edwards* rule is to avoid a detailed weighing of whether particular instances of "police badgering" (and, for that matter, purportedly ameliorative police statements) affected the voluntariness of waivers. Instead, the Court set a bright-line rule that any statements made in response to post-invocation interrogation should be suppressed. Petitioner would turn this premise on its head by having this Court look first at the actual coercive effect of the illicit interrogation to determine whether the accused "responded" to the interrogation at all. See *United States* v. *Gomez*, 927 F.2d 1530, 1539 (11th Cir. 1991) ("*Edwards* would be rendered meaningless if agents were permitted to continue interrogation after the request for counsel, and then claim that the consequent response by the accused represented initiation"). This "wag the dog" approach is flatly contrary to the constitutional and policy concerns that led to the *Edwards*

rule in the first place, and it must be rejected if the *Edwards* rule is going to continue to provide constitutional clarity.[5]

Instead, this Court should reaffirm the settled rule of *Edwards* that has guided courts and law enforcement for nearly a quarter-century: after an accused makes the significant constitutional decision to invoke his right to counsel, a custodial interrogation must cease, and all subsequent statements must be suppressed unless they are the product of the suspect's independent initiation of dialogue and are also voluntary.

Indeed, the *Edwards* rule sets forth a clear framework for courts to consider so-called "curative measures." What Petitioner calls "curative measures" – a gap in time, a break in custody, a promise by officers to respect an invocation of counsel – are not facts that automatically render post-invocation statements admissible. Rather, they are facts that may be relevant to a court's determination of the underlying factual issue of whether a defendant initiated communication. Regardless of whether police did or did not take a "curative measure" after an *Edwards* violation, the fundamental factual question is the same: was the suspect responding to police interrogation, or was he independently initiating a new encounter?

Under the facts of this case – where Mr. Blake's statement to police was in "direct response" to illegal police

[5] Petitioner also seems to conflate the rule of *Michigan* v. *Mosley*, 423 U.S. 96, 104 (1975), that assertions of the right to remain silent should be "honored" by police with the rule of *Edwards* that assertions of the right to counsel should terminate all interrogation. *See* Pet. Br. 10, 30. But this Court has recognized that an assertion of the right to counsel is fundamentally different from an assertion of the right to remain silent; by requesting counsel, a suspect states that "he is unable to proceed without a lawyer's advice." *Roberson*, 486 U.S. at 683; *see Mosley*, 423 U.S. at 110 n.2 (White, J., concurring). Police must therefore do more than "honor" the immediate request for counsel; they must cease all interrogation entirely.

interrogation – the answer to this question is clear. Because Mr. Blake responded to Officer Reese's interrogation, his statement was not an initiation by Mr. Blake, and the motion to suppress was rightly granted.

II. THE TRIAL COURT'S FACTUAL FINDINGS DEFINITIVELY ESTABLISH THAT MR. BLAKE DID NOT REINITIATE INTERROGATION.

Petitioner's entire argument is based on the fundamentally flawed premise that Maryland courts did not "consider[] . . . curative measures by the police." Pet. Br. at i. Far from ignoring Detective Johns's supposedly curative statement, Maryland courts considered that statement and came to the eminently reasonable factual conclusion that notwithstanding Johns's statement, Mr. Blake's statement was a response to Officer Reese's unlawful interrogation and the improper charging document to which it referred. Petitioner may not agree with the trial court's firsthand assessment of this episode and its impact on Mr. Blake, but that does not entitle it to relitigate this factual finding now.

The trial court's factual findings make Petitioner's argument about "curative measures" moot. Crediting the accounts of Detective Johns and Mr. Blake, the trial court concluded that Officer Reese yelled "I bet you want to talk now, huh!" at Blake and that this challenge constituted "interrogation" for purposes of *Miranda* (a point the Petitioner now finally concedes).[6] JA 357-62; Pet. Br. at 11 n.4. The trial court further found that Johns's statement did not vitiate the impact of this statement. JA 362. On the contrary, it found that Mr. Blake's later statement was made "in direct response" to Reese's question. *Id.* at 359-60.

[6] Petitioner's primary argument before both the trial court and the Maryland appellate courts was that Officer Reese's challenge was not "interrogation."

The Court of Appeals appropriately deferred to these factual findings and noted that they should not be reversed except for "clear error."[7] JA 407; see also *Bradshaw*, 462 U.S. at 1045 (declining "to build a superstructure of legal refinements around the word 'initiate' in this context"); *United States* v. *Michaud*, 268 F.3d 728, 737 (9th Cir. 2001) (whether accused initiated new conversation with police "is a factual question"); *Gomez*, 927 F.2d at 1539 n.9 (same) (citing *Fike* v. *James*, 833 F.2d 1503 (11th Cir. 1987)).[8]

Petitioner has not challenged the Maryland Court of Appeals' apparent use of the clear error standard for reviewing the trial court's factual findings, and any such challenge has therefore been waived. Regardless, the Maryland trial court's determinations that Mr. Blake's statement was a response to Officer Reese's comment is a factual finding entitled to clear error review. "Initiation" is not a legal term of art like "custody" or "probable cause." It is a simple matter of historical fact: Was the discussion begun by the suspect, or was it begun by police? This is a pure question of fact that is best resolved by a trial judge who can see the witnesses and directly assess their credibility. While an appellate court can provide guidance on a mixed question of law and fact, such as whether there is an

[7] Although the Court of Appeals noted that it was not opining definitively on the appropriate standard of review for a question of "initiation," JA 416, it reviewed key factual findings for clear error. *See id.* at 417 ("Judge North's conclusion that Detective Johns's remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous.").

[8] The Circuit Courts have disagreed about this issue, as the Sixth and the Eighth Circuits have held that the issue of whether an individual "initiates" a new conversation with the police is a question of law. *Holman* v. *Kemna*, 212 F.3d 413, 417 (8th Cir. 2000); *United States* v. *Whaley*, 13 F.3d 963, 968 (6th Cir. 1994). The Seventh Circuit Court of Appeals has sided with the Ninth and Eleventh Circuits on this point in at least one unpublished opinion. *See Palaggi* v. *Chrans*, 221 F.3d 1339 (7th Cir. 2000) (unpublished opinion), *available at* 2000 WL 1055789, at **3.

interrogation, it is poorly positioned to determine the fact-specific question of whether the suspect or the police initiated communication. This is particularly so when, like here, the trial court heard live testimony from each of the individuals present about the facts attendant to the individual's custody and the impetus for the suspect's comments.

The trial court weighed Mr. Blake's credibility and his statement that the primary reason he spoke to Detective Johns was because of the challenge by Officer Reese. JA 192. Petitioner presented no evidence to rebut this testimony, and its own witness, Detective Johns, corroborated both the challenge by Reese and the circumstances surrounding that challenge (including the misinformation regarding the death penalty, Mr. Blake's dress, and the manner in which he was held). The trial court accepted these accounts, finding that Mr. Blake's statement was "in direct response" to Reese's comment. *Id.* at 359-60. This finding was eminently reasonable – as the court noted, the police left immediately after Reese's challenge and Blake had no earlier opportunity to respond. Moreover, on its face Mr. Blake's comment is in fact a response to Reese. "I bet you want to talk now, huh!" was answered with "I can still talk to you guys?"; a declaration that Mr. Blake should want to talk to the police was answered with a request to talk to the police.

In an apparent attempt to duck this factual finding, Petitioner makes the curious argument that the trial court's finding should be rejected as an inappropriate "fruits" analysis. Pet. Br. at 29. Indeed, Petitioner seems to argue that this Court's decisions make it improper to "focus on the existence of a causal connection" between illegal interrogation and a suspect's statement. *Id.* This is simply not correct. The "fruit of the poisonous tree" doctrine, which this Court has recognized does not apply to *Miranda* violations, see *Dickerson* v. *United States*, 530 U.S. 428, 441 (2000), applies when a defendant seeks to suppress *other* evidence that is derived *from* unconstitutionally obtained evidence in

addition to suppress[illegible] the originating evidence itself. For example, a defe[illegible]no identified the location of certain evidence during a [illegible]ment obtained in violation of *Miranda* could not suppress that evidence. But in this case "fruits" are not at issue. The question concerns the "tree" – *i.e.*, whether Mr. Blake's statements themselves should be suppressed and not any evidence derived from his statement, such as, for example, a murder weapon.[9] Petitioner's reliance on the "fruit of the poisonous tree" doctrine therefore misses the mark entirely.

This Court has made clear that prior interrogations are relevant to "*psychological* judgment[s]" about a suspect's motivation. *Missouri* v. *Seibert*, 124 S. Ct. 2601, 2617 (2004) (O'Connor, J., dissenting) (recognizing that a court could consider the facts and circumstances preceding a statement to determine whether the suspect had been effectively informed of her right to remain silent). Similarly, in this case the impetus for Mr. Blake's statement is the heart of an *Edwards* inquiry – whether this statement was an independent initiation or a response to Officer Reese's illegal interrogation. Indeed, it is difficult to imagine how a court could answer this question without considering whether or not Mr. Blake's statement was a "direct response" to Officer Reese's comment. Whether there was a causal connection between Officer Reese's comments, the improper charging document and Mr. Blake's statement is highly relevant.

Joining Petitioner's efforts to rewrite the Maryland courts' decisions, the United States claims that the Court of Appeals established a "per se" rule that an *Edwards* violation can be cured by nothing short of a substantial lapse of time or by a break in custody. Br. of United States at 8. The Court of Appeals held nothing of the kind. The Court of Appeals did not hold that Detective Johns's statement *could not* cure

[9] This example was provided only for the purpose of illustration. In this matter, no physical evidence was derived from Mr. Blake's statement.

Officer Reese's violation; rather, it held that the trial court did not clearly err by concluding that Johns *did not* cure the violation. JA 417. Plainly, by giving consideration to whether there had been *any* cure, see *id.*, the Court of Appeals did not hold, implicitly or otherwise, that no cure had been offered because it was not one of the permissible cures. The United States's strained interpretation is solely based upon dicta from the Court of Appeals' opinion describing the opinion of a different court. JA 417. The United States has tortured this language into a *per se* ruling that is neither explicit nor implicit in the Court of Appeals opinion.

Because the state has conceded that Officer Reese's comment constituted an unlawful interrogation, and because the trial court found as a matter of fact that Mr. Blake's comment was a response to that interrogation, the application of *Edwards* is straightforward – Mr. Blake's statements were a response to illegal interrogation and must be suppressed. No superseding events of any nature occurred that were sufficient to warrant a conclusion that Mr. Blake's statement was a new and different discussion, rather than a response to an unlawful and coercive challenge. Accordingly, Petitioner's theoretical arguments about whether an *Edwards* violation could be cured such that a suspect could independently initiate discussion are beside the point.

On the factual record in this case, the trial court made a well-supported factual finding that Mr. Blake's statements were a response to Reese's unlawful interrogation. If Mr. Blake was responding to illegal interrogation, then Officer Johns's statement necessarily did not "cure" such interrogation. As a matter of fact, therefore, the *Edwards* violation was not cured and Mr. Blake's statements were properly suppressed.

III. EVEN CONSIDERED *DE NOVO*, DETECTIVE JOHNS'S STATEMENT CLEARLY DID NOT "CURE" THE *EDWARDS* VIOLATION.

Putting to one side questions of deference to the trial court's factual findings regarding the responsive nature of Mr. Blake's statement, this remains a simple case. Mr. Blake requested counsel and was subsequently interrogated in violation of *Edwards*. Although the question of whether Mr. Blake was illegally interrogated is not before this Court (because Petitioner has conceded the point), he clearly was. Officer Reese's comment was a direct challenge to Mr. Blake's decision to ask for counsel that implied that, in light of the charges he was facing and the possibility of the death penalty, Mr. Blake should want to talk to police in order to avoid a potential capital charge. This comment was "reasonably likely to elicit an incriminating response," and was interrogation. *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). Detective Johns's subsequent comments to Officer Reese did not cure the effect of Reese's illegal interrogation, because those comments were insufficient under any reasonable analysis to ensure that Mr. Blake voluntarily and independently reinitiated a discussion.

A. Effective Curative Measures Must Ensure That A Suspect's Decision To Reinitiate Was Independent Of The Unlawful Interrogation.

The adequacy of any cure of an *Edwards* violation must be measured by the purpose of *Edwards* itself – to preserve a suspect's choice to rely on counsel. *Edwards* was predicated on a recognition that a suspect's request for counsel was "a significant event" that should trigger an immediate end to interrogation without counsel. *Edwards*, 451 U.S. at 485. Once a suspect requests counsel, all interrogation must cease unless "the accused, not the police, reopen[s] the dialogue." *Id.* at 486 n.9. *Edwards* "[p]reserve[s] the integrity of an accused's choice to communicate with police only through counsel" by cutting off all interrogation that is not

independently initiated by the accused. *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988).

Once police have violated *Edwards* by interrogating a suspect who has invoked his Fifth Amendment right to counsel, a strong presumption arises that any subsequent statement by the suspect is the product of coercion. See *Roberson*, 486 U.S. at 681 (stating that any waiver that comes at the authorities' behest after a suspect has invoked his right to counsel "is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect"); see also *Mosley*, 423 U.S. at 110 n.2 (White, J., concurring) (explaining that "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism"). Any "cure" must be potent enough to overcome the presumption of coercion attendant to any *Edwards* violation.

"Curing" *Edwards* violations is therefore a matter of ensuring that a suspect has been restored to a position in which he can exercise a free choice to reopen dialogue. The only curative measures that will be effective to restore that free choice are measures that both remove the coercive effect of the unlawful interrogation and demonstrate that the suspect has decided to reinitiate communication in a new encounter that is independent of any unlawful interrogation.

The most obvious and effective curative measure is to grant the suspect's request for counsel. See *Miranda*, 384 U.S. at 466 (recognizing that a request for counsel will be an "adequate protective device"). By requesting counsel, a suspect expresses a belief that he cannot deal with police interrogation on his own and that he wants a lawyer's assistance. See *Roberson*, 486 U.S. at 683; *Mosley*, 423 U.S. at 110 n.2 (White, J., concurring) Full respect for the integrity of a suspect's choice to communicate through counsel requires police to grant that choice.

A curative measure may also be effective if it clearly demonstrates that the suspect's claimed reinitiation is a separate encounter from the previous unlawful interrogation. Measures like a break in custody will be effective in many circumstances to cure the effect of unlawful interrogation. See *McNeil* v. *Wisconsin*, 501 U.S. 171, 177 (1991).[10] A "substantial break in time and circumstances" could also dissipate the effect of illegal interrogation. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).[11] It is further conceivable that persistent attempts by a suspect to reinitiate dialogue over time, and with different officers or officials, might also demonstrate a voluntary and independent waiver of a prior invocation. In short, any circumstance establishing that a suspect's statement happened during "a markedly different experience" from the illegal interrogation, can be a curative measure, making it more likely that the suspect's statement was an independent reinitiation. *Id.* at 2612 (plurality decision).

Here, none of these curative measures were present. Mr. Blake was certainly not provided with counsel after Officer Reese's interrogation and he was certainly not released from custody. Moreover, there was no break in time and circumstances. At approximately 6:00 AM Mr. Blake was

---

[10] *See also McFadden* v. *Garraghty*, 820 F.2d 654, 660-61 (4th Cir. 1987); *United States* v. *Barlow*, 41 F.3d 935, 945-46 (5th Cir. 1994); *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 125 (7th Cir. 1987), *overruled on other grounds by United States* v. *LaGrone*, 43 F.3d 332 (7th Cir. 1994); *United States* v. *Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982); *United States* v. *Geittmann*, 733 F.2d 1419, 1425 (10th Cir. 1984); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988).

[11] *See United States* v. *Harris*, 221 F.3d 1048, 1053 (8th Cir. 2000) (holding three hour break in time sufficient to defeat *Edwards* protection); *Holman*, 212 F.3d at 419 (finding that confession given the day after an *Edwards* violation reduced likelihood that suspect was "under any compulsion to confess"); *Hill* v. *Brigano*, 199 F.3d 833, 842 (6th Cir. 1999) (concluding that confession given day after impermissible interrogation constituted a sufficient lapse in time).

illegally interrogated by Officer Reese in Detective Johns's presence. After Reese's challenge to Mr. Blake, Johns immediately pushed Reese out of the cell before Mr. Blake could respond. For the next half hour Mr. Blake remained alone and cold in the same cell, still laboring under the erroneous belief that he was facing the death penalty. Upon Johns's return, Mr. Blake asked if they could talk. The trial court and the Court of Appeals were clearly correct in concluding that the short gap in time did not remove the effect of Reese's interrogation. This is particularly so because Mr. Blake spoke to Johns *at the very next opportunity*, and because Mr. Blake's statement was directly responsive to Reese's statement.

B. Detective Johns's Statement Is Not An Effective Curative Measure.

Recognizing that Mr. Blake's supposed reinitiation presents few indicia of a new encounter, Petitioner proposes that police should be able to "cure" *Edwards* violations verbally, by merely stating an intention to engage in no further questioning. This suggestion is flawed for several reasons. In the first place, Petitioner's argument that police can talk their way out of an *Edwards* violation is inconsistent with this Court's recognition that the mere repetition of *Miranda* warnings is insufficient to remedy an *Edwards* violation. Moreover, the specific statement Detective Johns made here is not an adequate curative measure because it does nothing to cure the harm caused by Officer Reese's scoffing challenge to Mr. Blake's request for counsel. Johns's statement did not even rise to the level of a repeated *Miranda* warning, which this Court has recognized is insufficient to cure such a violation. *Roberson*, 486 U.S. at 686.

1. An *Edwards* violation cannot be cured by a mere repetition of *Miranda* rights.

Petitioner and his supporting *amici* argue that the ordinary *Edwards* rule should not apply if the police "cure" the

coercive effects of post-invocation interrogation by reassuring the accused of his Fifth Amendment rights. This argument presumes that the coercive effects of impermissible interrogation *can* be cured by the words of the police. Yet, this Court has recognized on numerous occasions that "the mere repetition of the *Miranda* warnings [do] not overcome the presumption of coercion that is created by prolonged police custody." *Roberson*, 486 U.S. at 686. That is because post-invocation interrogation, unlike ordinary custodial interrogation, does more than threaten to "subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 457-58. It also violates "the integrity of an accused's choice to communicate with police only through counsel," which "is the essence of *Edwards* and its progeny." *Patterson*, 487 U.S. at 291, *quoted in Minnick*, 498 U.S. at 153.

Police cannot cure this latter violation by reassuring an accused of his rights. If anything, such promises only heighten the confusion and fear of the accused as to whether his right to an attorney will be honored or not, thereby "exacerbat[ing] whatever compulsion to speak the suspect may be feeling." *Roberson*, 486 U.S. at 686. In this case, the danger of that "exacerbat[ion]" became a reality for Mr. Blake. As the trial court recognized, the dramatic scene created by Officer Reese's outburst and Detective Johns's response "looked like a good cop, bad cop routine" in which the "out of control" Reese had to be "reigned in" by Johns. JA 362. Such theatrics do not "cure" the coercive effect of Reese's post-invocation interrogation.

Petitioner's reliance on *Oregon* v. *Elstad*, 470 U.S. 298 (1985), and *Missouri* v. *Siebert*, 124 S. Ct. 2601 (2004) (plurality decision), to support its argument is misplaced. Both *Elstad* and *Siebert* involved situations where an individual gave an inculpatory statement prior to the issuance of *Miranda* warnings, then re-confessed after the warnings were issued. *Elstad*, 470 U.S. at 300-02; *Siebert*, 124 S. Ct. at 2606. On both occasions, the accused sought to suppress both

the pre-*Miranda* and post-*Miranda* statements. In *Elstad*, this Court held that the post-*Miranda* confession was admissible notwithstanding the accused's earlier, inadmissible confession so long as the first confession was not the product of "coercive or improper tactics." *Elstad*, 470 U.S. at 314.

In contrast, the interrogating officer in *Siebert* deliberately withheld the *Miranda* warnings as part of an "interrogation technique." *Siebert*, 124 S. Ct. at 2606. Although the officer administered the *Miranda* warnings before taking down a second confession from the accused, a plurality of this Court held that the post-*Miranda* statement was inadmissible as well because the interrogating officer's technique "challeng[ed] the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 2613. In a concurring opinion, Justice Kennedy noted that the post-*Miranda* confession might have been admissible had the police employed "[c]urative measures . . . to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.* at 2616 (Kennedy, J., concurring). The concurrence suggested that measures like "a substantial break in time and circumstances" or "an additional warning that explains the likely inadmissibility of the prewarning custodial statement" could constitute curative measures in an appropriate situation. *Id.*

Petitioner and its *amici* seek to transplant Justice Kennedy's "curative measures" into the context of post-invocation interrogations, but the concept is a poor fit in the *Edwards* arena. First, neither *Elstad* nor *Siebert* involved direct violations of *Miranda*, but rather concerned the appropriate remedy for legally obtained statements whose procurements nevertheless tended to weaken the overall effectiveness of the *Miranda* warnings. As Justice Kennedy noted in his concurring opinion in *Siebert*, whether the Court should

widen the exclusionary rule of *Miranda* to encompass technical non-violations of the rule turns on both the legitimacy of the government's procurement and use of the statement as well as the extent to which the admission of the statement "would frustrate *Miranda*'s central concerns and objectives." *Id.* at 2614. The police could mitigate any "concerns" about the effectiveness of *Miranda* by "ensur[ing] that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.* at 2616.

Interrogation of an individual after that person has invoked the right to counsel is not, however, an otherwise permissible act that arguably implicates the "concerns" of *Miranda*. It is a direct violation of *Miranda* and *Edwards*, and there is a serious question as to whether a statement by an officer after such a violation can be alone sufficient to "cure" the violation. Whether the police could cure their own violation based upon facts and circumstances different from those presented here is a question for another day. At a minimum, such efforts would, as noted above, require restoring the accused to his previous position, vitiating any taint, and conveying a direct and specific recognition that the accused's desire to rely on counsel would be respected. And such efforts would have to be particularly robust to ensure that any reasonable person "would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver" once the police have violated the very warning they have promulgated. *Siebert*, 124 S.Ct. at 2616. A promise, once broken, can rarely be repaired with yet more promises, and a suspect's confidence in a right that has been violated can rarely be restored with a subsequent assurance that the right will not be violated again.

2. Detective Johns's statement to Officer Reese did not negate the coercive effect of Reese's unlawful interrogation.

Petitioner claims that it was enough for Detective Johns to "mak[e] it clear that it was [Mr.] Blake's choice whether to talk to police, and [that] the police intended to honor that choice." Pet. Br. at 30. Even assuming that Johns's statement had those effects (which it did not), this does nothing to cure the fundamental harm of Officer Reese's statement. Petitioner attempts to minimize the impact of the illegal interrogation by claiming that Reese only made an "off-hand . . . remark," *id.*, and by implying that this case presents "an unintended *Miranda* violation." *Id.* at 22. Petitioner's claims are at odds with the plain facts and the non-erroneous factual findings made by the trial court. Petitioner's own officer described Reese's comment as a "confrontational" one – not an offhand remark. JA 61. And the fact that Reese denied ever making this statement further undercuts any suggestion of an innocent misstatement. *Id.* at 161.

In context, Officer Reese's challenge was not an offhand remark; it was a highly coercive statement intended to undermine Mr. Blake's assertion of his constitutional rights. Moreover, this direct challenge to Mr. Blake's request for counsel was made with the clear implication that Mr. Blake's refusal to speak with officers made it more likely that he would receive the death penalty. Those harmful effects were never cured by Detective Johns's statement to Reese. At no time did Johns inform Mr. Blake that he was not facing the death penalty or inquire whether Mr. Blake's statements were prompted by Reese's challenge.

The utter insufficiency of Detective Johns's "cure" is illustrated by measuring it against Officer Reese's acutely coercive statement. Reese's challenge was not an ordinary investigatory question. Reese confronted Mr. Blake and told him that he had made the wrong choice – that in light of the charges against him Mr. Blake should *want* to talk to police.

Such a violation cannot be cured by simply repeating that it was Blake's choice not to talk to police. As the trial court determined, Detective Johns's statement only heightened the coercive effect of Reese's statement by making it plain to Mr. Blake that he had made his (incorrect) choice and that he was going to suffer the consequences of a potential death penalty. JA 362. In short, Johns's recrimination to Reese only indicated that Mr. Blake could not be questioned anymore and did nothing to indicate to Mr. Blake that the substance of Reese's challenge (that Mr. Blake should want to talk to avoid the death penalty) was incorrect.

Under Petitioner's theory, police could challenge a suspect's request for counsel, tell a suspect that he should be making a different choice, and even assert that a suspect ultimately might be executed because of his non-cooperation. So long as the police follow those statements with a *pro forma* "reminder" that the suspect has the right not to talk to them, claims Petitioner, any subsequent statement by the suspect should be admissible.

Petitioner's theory therefore would map out an end-run around *Miranda*'s requirements. *Amicus curiae* the United States claims that "there is no appreciable danger" that officers would abuse a curative measures rule to circumvent *Edwards*, reasoning that a suspect's decision to reinitiate is outside the officer's control. Br. of United States at 26. This is simply gross speculation that is supported neither by theory nor by experience. In the first place, *every* decision by a suspect in custodial interrogation is outside the direct control of the police. Police using a two-step interrogation process, as was used in *Siebert*, cannot "control" whether a suspect will make the same statements after *Miranda* warnings that he made before the warnings. But with a practiced understanding of human nature and psychology, police can and will use any available method to elicit statements in the inherently coercive environment of custodial interrogation. See *Miranda*, 384 U.S. at 448-55; *Siebert*, 124 S. Ct. at 2608.

It would be Pollyannaish to assume that officers would never take advantage of a "curative measures" exception to *Edwards*, particularly one as broad as Petitioner seeks to draw. This case presents an apt example. Officer Reese directly and "confrontational[ly]" challenged Mr. Blake's choice to request counsel, JA 61, going so far as to suggest that his decision would affect whether he received the death penalty. This challenge was supposedly cured when another officer stated that Mr. Blake could not be questioned any more. But Mr. Blake was clearly told that he should have made the decision to cooperate in light of the charges and purported penalty. Whether or not this was an intentional strategy by the Maryland police,[12] it certainly presents a significant opportunity for officers to exercise intentional strategies. It would, in short, sanction the use of "good cop, bad cop" routines to challenge a suspect's invocation of the right to counsel.

The risk of abuse is especially acute because, after a suspect requests counsel, an interrogating officer has nothing to lose. Because the suspect has already asked to end the interrogation, the officer has no chance of obtaining incriminating statements unless the suspect decides to reinitiate. Police in that situation have a strong incentive to

---

[12] Although the officers' subjective intent is not relevant to the objective question of whether Mr. Blake reinitiated contact, the facts suggest that their conduct may have been the result of a coordinated strategy. Detective Johns was unable to explain why he was accompanied by Officer Reese, an officer unconnected with the investigation. JA 53, 55. And although Detective Johns and Officer Reese supposedly visited Mr. Blake's cell to give him the statement of charges, the statement of charges had actually been generated at 2:46 AM, nearly two hours before Mr. Blake's arrest and nearly two and a half hours before Mr. Blake was first questioned. *See id.* at 329, 333. The statement of charges could easily have been presented to Mr. Blake before he invoked his right to counsel. Indeed, the trial court noted how much Officer Reese's and Detective Johns' actions when giving Mr. Blake the statement of charges resembled a "good-cop, bad-cop" strategy. *Id.* at 362.

goad suspects into changing their mind, and this Court can expect that police will exploit a curative measures exception to the limit of the law.[13] If Petitioner's expansive version of curative measures were accepted, then *Edwards*' protection would be eviscerated.

Moreover, Detective Johns's statement was also inadequate because it was not directed at Mr. Blake. While Johns reprimanded Officer Reese, he never addressed Mr. Blake. Conversations between officers in a suspect's presence are ordinarily not interrogation, even if the statements would have been interrogation if they had been directed at a suspect. See *Innis*, 446 U.S. at 302. Similarly, a conversation between officers in a suspect's presence is not sufficient to communicate a curing message. To hold otherwise would be to create an illogical disparity – if an officer's comment to another officer in the presence of a suspect will rarely constitute "interrogation," then such a statement between officers should rarely cure an illegal interrogation. Because curative measures can only be effective when they restore the suspect to a position where he can exercise a free choice, an effective curative measure should almost always be directed at the suspect. This is particularly so in cases like this one, where the interrogation was "confrontational" and clearly directed at the suspect. Reese's direct and forceful challenge to Mr. Blake's decision to request counsel could only be cured verbally by an equally direct and forceful statement to Mr. Blake. Because Johns's statement to Reese was far from adequate to cure the severe *Edwards* violation committed by Reese, Johns's statement was not a sufficient "curative measure."

---

[13] *See generally* Charles D. Weisselberg, *In the Stationhouse after Dickerson*, 99 Mich. L. Rev. 1121, 1122-25 (2001) (describing how police interrogation practices are responsive to this Court's *Miranda* decisions).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

JEFFREY T. GREEN
MATTHEW J. WARREN
ANDREW D. FAUSETT
JENNIFER B. TATEL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

KENNETH W. RAVENELL*
IVAN J. BATES
MATTHEW A.S. ESWORTHY
SCHULMAN, TREEM, KAMINKOW, GILDEN & RAVENELL, P.A.
THE BALTIMORE INNER HARBOR WORLD TRADE CENTER
SUITE 1800
401 EAST PRATT STREET
BALTIMORE, MD 21202-3004
(410) 659-0111

Counsel for Respondent

* Counsel of Record

August 5, 2005

(9)

Filed
8/5/05

No. 04-373

In The
Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

LEEANDER JEROME BLAKE,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals
Of Maryland

BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF RESPONDENT

STEVEN B. DUKE*
127 Wall Street
P.O. Box 208215
New Haven, CT 06511
(203) 432-4959

JO-ANN WALLACE
President, NLADA
CHARLES WYNDER
Vice-President, NLADA
1140 Connecticut Ave. NW
Suite 900
Washington, D.C. 20036
(202) 452-0620

Attorneys for Amicus Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a police officer improperly interrogates a suspect after invocation of the suspect's right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police within the meaning of *Edwards*?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTERESTS OF AMICUS CURIAE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The Petition May Have Been Improvidently Granted	9
II. The Decision Below Was Correct	14
A. The Right to Counsel Prior to and During Custodial Interrogation is Fundamental and Must be Protected	14
B. *Edwards* Does Not Allow "Initiations" Generated by the Police to Void the Right to Counsel	18
CONCLUSION	30

TABLE OF AUTHORITIES

	Page
CASES	
Arizona v. Fulminante, 499 U.S. 279 (1991)	13
Blake v. State, 38 Md. 176, 835 A.2d 1103 (2003)	10
Culombe v. Connecticut, 367 U.S. 568 (1961)	13
Davis v. North Carolina, 384 U.S. 737 (1966)	13
Dickerson v. United States, 530 U.S. 428 (2000)	14
Duckworth v. Egan, 492 U.S. 195 (1989)	22
Edwards v. Arizona, 451 U.S. 477 (1981)	*passim*
Frazier v. Cupp, 394 U.S. 731 (1969)	16
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)	13
Haynes v. Washington, 373 U.S. 503 (1963)	13
Michigan v. Jackson, 473 U.S. 625 (1986)	19
Mincey v. Arizona, 437 U.S. 385 (1978)	13
Minnick v. Mississippi, 498 U.S. 146 (1990)	9, 21
Miranda v. Arizona, 384 U.S. 436 (1966)	*passim*
Oregon v. Bradshaw, 462 U.S. 1039 (1983)	9, 20
Oregon v. Elstad, 470 U.S. 298 (1985)	11, 24
Rogers v. United States, 522 U.S. 252 (1998)	12
OTHER AUTHORITIES	
Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1447 (2004)	18

TABLE OF AUTHORITIES – Continued

Page

Inbau, Reid, Buckley & Jayne, *Criminal Interrogation and Confessions* (4th ed. 2004) 16

Leo, *Miranda and the Problem of False Confessions* in *The Miranda Debate* 271 (Leo & Thomas eds., 1998) 18

Scheck, Neufeld & Dwyer, *Actual Innocence* (2000) 18

Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishing Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996) 17

Webster's Third New International Dictionary of the English Language (Unabridged) (1993) 24

White, Miranda's *Waning Protections* (2001) 16

Young, *Unnecessary Evil: Policy Lying in Interrogations*, 28 CONN. L. REV. 425 (1996) 16

BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of respondent Leeander Blake's assertion of rights under the Fourteenth Amendment. Both petitioner and respondent have granted amicus consent to file this brief, and letters of consent have been filed with the clerk of this Court.[1]

INTERESTS OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA), a nonprofit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including nonprofit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members.

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NLADA, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed amicus curiae briefs in major constitutional cases before this Court involving the administration of the criminal justice system and the right to counsel.

NLADA is filing this brief because it believes that if the claims asserted by petitioner are adopted by this Court, the right to counsel recognized and respected by *Miranda v. Arizona* and *Edwards v. Arizona* will be gravely weakened and will easily and routinely be circumvented by interrogators manipulating prisoners in custody into waiving their rights.

STATEMENT OF FACTS

On October 25, 2002, Terrence Tolbert was arrested for the murder of Straughan Lee Griffin. Tolbert implicated respondent in the crime (JA 397). Between 4:30 and 5:00 a.m. the next day, the 17 year-old respondent was arrested at gunpoint in his home, while watching television, wearing boxer shorts and a tank top with no shoes. He was not permitted to put on any other clothing but was handcuffed and taken to the Annapolis Police Department by uniformed officer Curtis Reese, among others (JA 177, 354-56, 397, 401).

Respondent was taken to a room in the police station where he was confronted by the detective in charge of the investigation, William Johns, who attempted an interrogation. Detective Johns advised respondent of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and respondent told him he did not wish to speak to any police officers without an attorney. He was then placed in a holding cell (JA 183-84, 398).

About thirty-five minutes later, Detective Johns and Officer Reese returned to respondent's holding cell and handed to him a written statement of the charges against him, which included first-degree murder, armed robbery and armed carjacking. In large capital letters, the penalty for the first degree murder charge read, "DEATH." The statement of "charges" also included an allegation that Tolbert had asserted that respondent had shot the victim and ran over his body with his car (JA 340). Detective Johns read the "charges" and the penalty to respondent and then advised him that, "They are serious charges. He needs to read it carefully and make sure he understood it" (JA 22-23, 398-99). Officer Reese then loudly confronted respondent and said, "I bet you want to talk now, huh?" (JA 23). Detective Johns then said to Reese, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." The officers left (JA 23, 399).

Less than half an hour later, Detective Johns returned alone to the cell, carrying some of respondent's clothing, which he handed to respondent. Respondent then asked him, "I can still talk to you?" Detective Johns re-Mirandized respondent and another interrogation began. Respondent made some incriminating statements and was polygraphed, in a process that began about 8:30 or 9:00,

after which he made additional incriminating statements (JA 25-26, 28, 37-38).

The trial judge, after an evidentiary hearing in which all the participants testified, ordered respondent's incriminating statements suppressed, as having been obtained in violation of *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981) (JA 366). Although crediting Detective Johns whenever his testimony differed from respondent's (JA 400), the trial judge nonetheless found that, after respondent asserted his right to counsel, the interrogation did not "cease" but continued, in a course of state action that the state both should have realized and did realize was likely to lead to an incriminating response (JA 357, 359-60). The incriminating responses that followed were the product of that prohibited interrogation (JA 359-60).

The trial judge considered the entire context in which the respondent gave his statement. Factors in the trial judge's decision were the respondent's age, that he apparently had been up all night, was arrested in the predawn hours, while watching cartoons in his underwear, shoeless. He was taken in this condition, in handcuffs, to the police station. After he invoked his rights, he was given a copy of the charges against him that erroneously stated that the charges carried the penalty of "DEATH." Also included in the documents ostensibly stating the "charges" was a statement that Tolbert had blamed respondent for shooting the victim and running over him with his car. Detective Johns, respondent's unsuccessful interrogator, also read the charges to the respondent and told him the charges were "serious" and he needed to "make sure he understood [them]" (JA 356).

The confrontations did not stop there. When respondent's arresting officer, Mr. Reese, said to respondent in a loud, confrontational tone, "I bet you want to talk now, huh?," the trial judge found this was interrogation (JA 357), and that Officer Reese's statement clearly referred to the charges that had just been handed to respondent (JA 359-60). The trial judge also found that Detective Johns' statement that respondent "doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now," did not erase the effects of the false statement about the death penalty, the statement that Tolbert blamed respondent for the murder, or Officer Reese's clear suggestion that respondent talk about the charges (JA 416).

Moreover, the trial judge found Detective Johns' statement that we "cannot talk to him now," followed by the officers leaving, set the stage for Detective Johns' return later (JA 358-60). What Detective Johns said to Officer Reese was not, "We can't talk to him until he has a lawyer," it was, "We can't talk to him now." When Detective Johns appeared later with the clothing, a natural question that might occur to respondent was, "I can still talk to you?" According to the trial judge, the short time intervening between Reese and Johns' statements and Johns' reappearance did not fundamentally alter the dynamics. Reese had urged respondent to talk "now." Johns said they couldn't talk "now." Johns' return 28 minutes later was the first time that respondent had a chance to respond to the charges, the threat of the death penalty, the statement blaming respondent for shooting and driving over the victim, and to Reese's urgings (JA 358-60). The trial judge found that respondent's statement to Detective Johns was clearly a result of what had transpired

shortly before and that what had transpired was a clear violation of *Miranda* and *Edwards* (JA 360-61).

The Maryland Court of Special Appeals reversed, holding that the police actions in question did not amount to interrogation (JA 388). The Court of Appeals of Maryland unanimously reversed the intermediate court and upheld the trial court's suppression of respondent's statements (JA 418). This Court granted the State's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I.

The Question Presented, upon which this Court granted the petition for a writ of certiorari, is not actually present in this case. There was no claim below and no suggestion by any court below that a re-interrogation by police in violation of *Miranda* and *Edwards* necessarily precludes a later "initiation" by the suspect. Both parties in this case agree that it is possible for "curative" measures or other circumstances to reduce or counteract the effects of an improper interrogation and to allow a genuine re-initiation of interrogation by the suspect. The court below plainly agreed as well. Thus, since there is no dispute about the general proposition stated in the Question Presented, there is only an issue of fact: whether under all the circumstances, within the meaning of *Edwards*, the suspect in this case "initiated" a general discussion of the facts of the crime with the police.

Whether there was such an "initiation," the court below held – and both parties agree – depends upon an

evaluation of the entire context and circumstances. The trial judge, who alone saw and heard all the participants testify, was in the very best position to determine the factual issues. The court below unanimously upheld her factual determinations. Since this Court does not sit to redetermine factual issues decided by lower courts – especially State courts – the petition for a writ of certiorari appears to have been improvidently granted.

II.

For four decades, this Court has consistently and repeatedly affirmed the right of a suspect in police custody to remain silent and to consult an attorney before and during police interrogation. *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). The Court has also recognized that many persons in custody need the assistance of counsel to advise them before deciding whether to submit to police interrogation or to negotiate less coercive, less threatening, more reliable conditions for such an interrogation. The Court has also repeatedly held that one in police custody may choose to waive both the right to remain silent and the right to counsel, even if doing so is gravely imprudent and even if based upon numerous erroneous assumptions about the interrogation process. If, after receiving the warnings required by *Miranda*, a suspect says that he wishes to consult with counsel, all interrogation must stop and the invocation of the right to counsel must be scrupulously protected by the police. Under *Edwards* and its progeny, no re-interrogation can occur thereafter unless the suspect is afforded counsel or, unless the suspect himself "initiates" a general discussion about the crime or charges with the police.

Whether the suspect "initiated" a general conversation with the police about the facts of the crime or charges turns not only on what the suspect said but on the entire context of the statement, including what preceded that statement and what influences were brought to bear upon the suspect prior to the alleged "initiation."

If there have been no police influences imposed upon the suspect since he invoked his right to counsel (other than those generally incident to incarceration), and the suspect not only suggests he would like to talk to the police but says he wants to talk about the crime or charges, he has "initiated" within the meaning of *Edwards*, even if third parties unconnected with the police have influenced his decision. The police have no control over such influences and it is the suspect's right and responsibility to evaluate them as he sees fit.

If, on the other hand, the police have engaged in acts or statements that encouraged the suspect to reconsider his decision to consult counsel, a court must examine such acts or statements and determine what effect, if any, they had on the statements made by the suspect that constitute the alleged "initiation." If the suspect's statements are clearly the result of such police activities – whether or not those activities constitute the functional equivalent of interrogation – then it would be absurd to label the suspect's statements as "initiation." Rather, they would be the result of the activities of the police which produced them. The exception to the *Edwards* rule would not apply and subsequently obtained incriminating statements should be suppressed.

Where, as here, the police have engaged in interrogation in violation of *Miranda* and *Edwards*, and the statement of

the suspect is plainly in response to such interrogation and closely follows upon it, to find that the suspect's statement fulfilled the *Edwards* exception would be tantamount to overturning *Edwards* itself, for it would invite police to do what *Edwards* and many other decisions of this Court have said they should not do – try to persuade the suspect to retract his decision to consult counsel and instead submit to interrogation without counsel.

A suspect in custody on serious criminal charges, especially a 17 year-old arrested in his underwear near dawn, is vulnerable to manipulation by the police. If the police were free to encourage a suspect to reconsider his decision to consult counsel, that decision would be disrespected and trivialized and the essence of *Edwards* flouted. On the other hand, if the police engage in improper efforts to manipulate the decision of the custodial suspect, as here, they are not forever precluded from interrogating the suspect. If, after he consults counsel, or even after intervening events demonstrate that the previous manipulations have lost their influence, the suspect initiates conversations based upon other considerations, nothing in the *Edwards* doctrine precludes the suspect from waiving his rights.

ARGUMENT

I.

THE PETITION MAY HAVE BEEN IMPROVIDENTLY GRANTED

The court below granted review "to consider the single question of whether the police actions in question constituted the functional equivalent of interrogation, following

petitioner's invocation of his Miranda rights. . . . *Blake v. State*, 378 Md. 176, 835 A.2d 1103 (2003)." Pet. App. 2a. The court answered that question in the affirmative and reinstated the findings of the trial judge. This Court granted Maryland's petition for a writ of certiorari to consider not whether the police engaged in the "functional equivalent of interrogation," but rather whether "*Edwards* permit[s] consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police." That issue is not properly presented to this Court by the decision of the court below. Not only is that not what the court below granted review to consider, nothing in the court's opinion questions or casts doubt upon that proposition. Respondent did not contend below that curative measures are impossible or that improper interrogation prohibited by *Edwards* necessarily precludes a subsequent "initiation" by the suspect, nor did the court below make such a suggestion. In fact, the court below clearly acknowledged that a suspect's "initiation" is possible after an *Edwards* violation.

There is no controversy about principles

Maryland correctly accepts the conclusion of the court below that the police interrogated respondent after he invoked his right to counsel in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981). All that petitioner challenges in the decision below is the court's conclusion that respondent did not "initiate" a conversation with Detective Johns about the facts of the case, as that concept is employed in *Edwards* and subsequent decisions applying *Edwards*. But the Maryland court's conclusion was clearly not based on the notion that an *Edwards* violation forever precludes a

suspect from "initiating" a conversation culminating in a knowing waiver of *Miranda* rights. In suggesting otherwise, petitioner has created an adversary of straw, a fictional opponent, a nonexistent controversy. As if criticizing the court below, petitioner says, "Even assuming an impermissible remark by Officer Reese, to ascertain whether Blake initiated communications before knowingly and intelligently waiving his right to counsel, one 'must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect.'" Pet. 14, quoting *Oregon v. Elstad*, 470 U.S. 298, 318 (1985). *See also* Pet. 7, Pet. Br. at 10, 17. Yet this is what the court below said as well. As the record abundantly demonstrates, both the trial judge and the Court of Appeals exhaustively examined all the circumstances surrounding the police actions in question and found that while an "initiation" was possible after an improper interrogation, respondent did not "initiate" the conversation in the instant case. Apart from that fact-bound result, it is difficult to see what disagreement petitioner has with the decision below.

Attempting to convert its disappointment on the core issue decided below – that the police interrogated respondent – into a different question, and an issue of Constitutional law as well, petitioner implied that the court below failed to consider whether the remarks of Detective Johns cured or corrected the efforts to interrogate respondent that immediately preceded Johns' remarks. Pet. 7-8. The State also implied that the court below ruled that the police can never cure an *Edwards* violation. Pet. 14 ("It certainly cannot be the case that Officer Reese's comment forever taints a subsequent waiver.") To the contrary, the court below clearly assumed that curative remarks are possible and that an arrestee can still "initiate" conversations

with the police after the authorities have violated *Miranda* and *Edwards*. The court found, however, as had the trial judge, that the remarks of Detective Johns did not cancel or overcome the effects of the erroneous "DEATH" message, the claim that Tolbert blamed respondent for the murder, and the related invitation of officer Reese to "talk now" (JA 417-18). The trial judge saw and heard the witnesses and made findings based upon her evaluation of their demeanor and their testimony. The trial judge found that respondent's incriminating statements were in response to and a result of the functional interrogation that occurred less than half an hour before (JA 357-61). Neither the trial judge nor the court below suggested that an improper interrogation following an invocation of *Miranda* rights can never be cured by an appropriate statement, a substantial time interval, or other circumstances.

A question of fact for which deference is due

The crux of petitioner's disagreement with the court below is not about whether *Edwards allows* for curative measures, but rather whether the court evaluated the evidence in this case correctly. Accordingly, it is difficult to see how this Court has before it any Constitutional principle for review. *Rogers v. United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., concurring in result) ("[W]e granted certiorari to address an important issue of constitutional law, and we ought not to decide the question if it has not been cleanly presented."). Whether the functional interrogation of respondent was causally related to respondent's question to Detective Johns, "Can I still talk to you?," is an issue the resolution of which rests heavily on an evaluation of the particular context, including the personalities

of the parties, their psychological interactions, and numerous other circumstances. As this Court has often observed, the trial judge has unique advantages in making such factual determinations, which should not be disturbed unless clearly erroneous. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) ("We normally give great deference to the factual findings of the state court," citing *Davis v. North Carolina*, 384 U.S. 737, 741 (1966); *Haynes v. Washington*, 373 U.S. 503, 515 (1963); *Culombe v. Connecticut*, 367 U.S. 568, 603-04 (1961)); *see also*, *Mincey v. Arizona*, 437 U.S. 385, 407 (1978) (Rehnquist, J, concurring in part, dissenting in part) ("By all of these standards enunciated in our previous cases, I think the Court today goes too far in substituting its own judgment for the judgment of a trial court and the highest court of a State, both of which decided these disputed issues differently than does this Court, and both of which were a good deal closer to the factual occurrences than is this Court.") This Court does not sit to second-guess factual determinations by trial judges, especially those sitting on State courts. *See, e.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); *Haynes v. State of Washington*, 373 U.S. 503, 515-16 (1963) ("As state courts are, in instances such as this, charged with the primary responsibility of protecting basic and essential rights, we accord an appropriate and substantial effect to their resolutions of conflicts in evidence as to the occurrence or nonoccurrence of factual events and happenings. This is particularly apposite because the trial judge and jury are

closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony.")

The writ of certiorari should be dismissed as improvidently granted.

II.

THE DECISION BELOW WAS CORRECT

A. The Right to Counsel Prior to and During Custodial Interrogation is Fundamental and Must be Protected.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), which this Court recently reaffirmed in *Dickerson v. United States*, 530 U.S. 428 (2000), the Court stressed the importance of counsel to one subjected to custodial interrogation. That importance is as great today as it was four decades ago.

The interrogation process

In *Miranda*, the Court elaborated on the psychological pressures inherent in custodial interrogation and quoted police interrogation manuals which described the tricks and techniques of successful interrogation. The interrogator is advised to assume the guilt of the suspect and not concede for a moment that he might be innocent. Self-incrimination is to be encouraged by minimizing the seriousness of the offense, by offering sympathy and moral excuses for what is assumed to have been the crime committed by the suspect. Outright lies are also recommended, including, where appropriate, phony lineups where phony witnesses select the suspect. *Miranda*, 384 U.S. at 453. Interrogators can act in tandem, playing "Mutt and Jeff," where "Mutt," one of the

interrogators, is hostile and threatening and the other, "Jeff," pleasant, comforting and protective, objecting to the tactics of "Mutt," and reassuring the suspect that he can be trusted and is sympathetic to the suspect. Later, "Jeff makes his plea for cooperation [when] Mutt is not present in the room." *Id.* at 452. An attorney who is aware of these techniques and their coercive pressures can prevent them from being used or at the very least act as a witness to what transpires during custodial interrogation. If, after consulting with an attorney, the suspect is asked to submit to interrogation without the attorney being present, and the suspect is interested in submitting to same, the attorney can at least warn the suspect of the pitfalls, tricks and lies he may be subject to and can try to negotiate more reliable, less coercive conditions for the interrogation, such as audio or video taping.

Many who read *Miranda* shortly after it was decided understood it to mean that most of the practices described in the manuals were now prohibited. For example, the Court said that if after being warned, a suspect wished to waive his right to silence and to the assistance of counsel, merely answering questions would not constitute a waiver. In fact, there would be a "heavy burden on the police to prove a knowing, intelligent waiver." The Court also said that a decision to talk to the police was always provisional and revocable at will. There could be no waiver that would require the suspect to submit to further questioning if he changed his mind. *Id.* at 474, 476 n. 45. It is imperative that the "right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469. Moreover, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* at 476. Nor may the prosecution "use at trial

the fact that the suspect stood mute or claimed his privilege in the face of accusation." *Id.* at 468 n. 37.

The importance of respecting *Miranda's* right to counsel

The regime that many anticipated after *Miranda* did not materialize. *Miranda* has been stripped to its fleshless skeleton by hostile interpretations. *See* White, Miranda's *Waning Protections* (2001). If the warnings required by *Miranda* are delivered (it does not matter in what tone of voice or even with some additional, undermining or contradictory observations thrown in) and the suspect answers questions thereafter, most courts hold that all rights have been waived. Although the suspect still has an abstract right to stop the interrogation at any time, no one is required to tell him that, and very few interrogators do. Although silence cannot be used at trial to convict the defendant, the police need not tell him that either. Neither must the police refrain from lies and tricks. Taking the lead from such cases in this Court as *Frazier v. Cupp*, 394 U.S. 731 (1969), all courts seem to agree that once the suspect begins to talk after receiving the four-pronged warning required by *Miranda*, all the old lies and tricks can be used with impunity. *See* Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996). The police manuals on interrogation techniques have changed very little. Indeed, the major changes in the intervening four decades appear to have been the incorporation of new psychological techniques to induce confessions. *See, e.g.*, Inbau, et al., *Criminal Interrogation and Confessions* (4th ed. 2004).

Once a suspect waives his right to consult counsel, he is fair game for the police, and is hopelessly overmatched and outmanned. Custodial interrogation is no less "inherently coercive" today than it was before *Miranda* was decided. And the flow of confessions has not significantly subsided. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishing Small Social Costs*, 90 NW. U. L. REV. 500 (1996). Today, no less than in 1966, "the individual's right to have counsel present at the interrogation is indispensable." *Miranda*, 384 U.S. at 469.

Courts agree that a suspect can make a "knowing and intelligent waiver" of his right to silence and his right to have counsel present, even though he does not know what crime the police are investigating, or that the police will be free to lie to him, threaten him, and trick him once he agrees to talk, and even though he does not know that he can stop the interrogation any time, and even though he erroneously believes that if he does not submit to interrogation his silence can be used against him. Such a "waiver" conclusion is borderline fiction, and underscores the importance of respecting the initial decision of the suspect to consult counsel.

Most suspects would be well-advised to consult an attorney before submitting to interrogation. The attorney is an invaluable protection against coercion, fraud, abuse and police "testilying." That right should be scrupulously protected as a last meaningful remnant of the "system" that the Court sought to "delineate" in *Miranda*. 384 U.S. at 471.

Protecting the innocent

The need to protect the right to silence and the concomitant right to counsel is not merely to protect the

suspect against being pressured, tricked, lied to and threatened, but to protect the innocent. *Id.* at 455 n. 24. Interrogation techniques that are commonplace in American police interrogation rooms are not merely effective against the guilty, they also elicit confessions from the innocent. *See generally*, Leo, *Miranda and the Problem of False Confessions, in The Miranda Debate* 271 (Leo & Thomas eds., 1998). Of the first 62 convicted persons who were exonerated by DNA matching, 15 of them had falsely confessed. Scheck, Neufeld & Dwyer, *Actual Innocence* App. 2 (2000). In 1989, five young men confessed, four of them in writing, most of them in the presence of their parents and on videotape, to the rape and near fatal beating of a jogger in Central Park, New York. They even pled guilty. DNA analysis and a subsequent confession and corroborative evidence later established that all five men were innocent of the crime. It had been committed by a single rapist. Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1447 (2004).

B. *Edwards* Does Not Allow "Initiations" Generated by the Police to Void the Right to Counsel.

Although we do not believe the issue is properly before this Court, should the Court nonetheless choose to revisit *Edwards* and whether curative measures are possible after post-invocation interrogation, the Court should be careful not to invite gross circumvention of *Edwards*, leaving that doctrine an empty vessel. "*Edwards* is grounded in the understanding that 'the assertion of the right to counsel [is] a significant event'" and that "additional safeguards are necessary when the accused asks for

counsel." *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). "The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." *Id.* at 633 n. 7. The importance of counsel and a decent respect for the right of an arrestee to consult counsel requires that his decision be scrupulously respected. An arrestee who says he wants to consult counsel rather than submit to interrogation can easily have that decision undermined by subtle manipulations.

The *Edwards* doctrine holds that once a suspect in custody has invoked his right to counsel, incriminating statements subsequently obtained by police interrogation are inadmissible unless the suspect has conferred with counsel or has himself "initiated" conversations with the police about the crime and has knowingly and intelligently waived his *Miranda* rights. This rule is necessary to prevent "persistent attempts by officials to persuade [the suspect] to waive his rights. . . ." *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) or, "to protect an accused in police custody from being badgered by police officers. . . ." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion). The ultimate question, in a case like the present, therefore, is not whether the police improperly "interrogated" the suspect or even whether they "badgered" him, but whether he "initiated" the incriminating conversations. We agree with petitioner, and with amici, and with the court below, that it is possible for the suspect to "initiate" after being "badgered" or even re-interrogated, but we strongly disagree with petitioner's claim that Detective Johns' presentation and explanation of the charges, and the fact (if it was a fact) that Tolbert had blamed respondent for shooting the victim and running over his body was "irrelevant" to

whether respondent "initiated" a reopening of interrogation (Pet. Br. at 28-29). Petitioner's further claim that Officer Reese's suggestion that respondent should want to "talk now" is also irrelevant can hardly be serious.

The significance of context

As petitioner correctly contends, in "determining whether an accused has initiated further contact with the police, the entire course of conduct should be considered" (Pet. Br. 10, 25). And whether the suspect himself "initiated" cannot be meaningfully determined without examining the activities of the police between the invocation of counsel and the alleged "initiation." The mere fact that a suspect says to a policeman, "I can still talk to you?" cannot be found to be an "initiation" in the abstract. A mere suggestion by a suspect in custody that he wants to "talk" to a policeman is not the kind of "initiation" contemplated by *Edwards*. Without the context, such a statement could be preliminary to a request for food, drink, clothing, or a phone call, not "a willingness and a desire for generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46.

The court below reasonably concluded that respondent's question, "I can still talk to you?" was triggered by the interactions shortly before and was not an "initiation" in the sense in which that concept has been employed by this Court. Whether what the police did during that earlier encounter constituted "interrogation," "badgering," or an "attempt" to "persuade" respondent to "waive his rights," is not the ultimate issue. The issue is whether, under all the circumstances, the respondent himself, on his own accord, based upon a change of mind not induced

by the police, decided to engage in "a generalized discussion about the investigation" without the benefit of counsel. There can be only one answer: the one given by the court below.

In arguing that what transpired between the police and respondent half an hour before the alleged "initiation" is "irrelevant," petitioner implicitly argues that "initiation" should be given a formalistic meaning divorced from the realities of the custodial context. Thus, petitioner asserts that it is immaterial whether the alleged "initiation" was the "fruit" of the impermissible interrogation (Pet. Br. 20). Petitioner seems to contend that there are only two relevant questions to be answered in determining whether the suspect "initiated" the conversation: (1) did the suspect know that he still had the right not "to talk to the police without his attorney" (*Id.* at 25) and, (2) did the suspect use words that suggested a desire to talk or have a "conversation" with the police? (*Id.*) Manifestly, however, to substitute this test for the one this Court has repeatedly applied would destroy the essence of *Edwards* and invite the very kind of "badgering" that the Court has sought to prevent. It is of course inconsistent with the suspect's "unfettered choice" to tell him, as in *Minnick*, 498 U.S. at 149, that "you have to talk," but refraining from telling such a lie does not seriously impede or discourage the police from attempting to induce the suspect to reconsider his decision to consult counsel. Petitioner's approach constricts the essence of *Miranda* and *Edwards* into nothing more than assuring that the suspect is aware of his abstract rights.[2] That is only a small part of those

[2] Petitioner seems to suggest that all that is necessary to satisfy *Edwards* is a new *Miranda* warning followed by an indication from the

(Continued on following page)

decisions. Equally important is that the invocation of his rights by the suspect must be scrupulously respected, not merely in formalities but in the interactions between the police and the suspect. That respect was not demonstrated below.

A new chapter in the interrogation manuals?

If the Court holds that respondent in this case surrendered his right to counsel by the six words he said 28 minutes after he was improperly interrogated, there will be a new chapter in the police interrogation manuals: "HOW TO GET THE SUSPECT TO TALK AFTER HE SAYS HE WANTS A LAWYER."

A basic response, the manuals will suggest, is to advise the suspect who has invoked his right to counsel that unless he has his own lawyer, one can't be appointed for him by the police but he must wait until he goes to court. Then tell him that if he changes his mind about wanting to consult a lawyer before talking to the police about the charges, he will have to initiate the conversation himself. He will have to tell someone that he has changed his mind about needing a lawyer. Such statements to the suspect would be correct statements of the law. *Cf. Duckworth v. Egan*, 492 U.S. 195 (1989). Under petitioner's reading of this Court's decisions, if the suspect then said, "I will talk now," the suspect's invocation of the

---

suspect that he is willing to talk, for the *Miranda* warning itself provides the assurance that petitioner suggests is sufficiently curative. That is clearly not the law, however. Giving repeated *Miranda* warnings after the suspect invokes his right to counsel would probably constitute a re-interrogation rather than satisfying *Edwards*. So also might the "curative measures" suggested by petitioner.

right to counsel would be voided. A second, lawful interrogation could then commence.

If the interrogation manual's standard recommended response to the invocation of counsel does not produce the desired waiver, the manual would probably suggest that the interrogators could use the old good cop/bad cop, or "Mutt and Jeff" routine. Revisit the suspect. Have Mutt provide new and threatening "information" about the charges, such as the penalty the suspect is facing or that the other suspect has incriminated him as the "shooter" or "instigator." Jeff then says, "We can't talk to him about any of that because he said he wants to see a lawyer first. He doesn't have a lawyer and one can't be appointed for him until Monday, so he can't talk to us until then unless he initiates it himself." Mutt and Jeff then leave. Jeff returns later on some pretext or other, such as giving the suspect his clothing. In most cases, the text will opine, the suspect will "initiate" a conversation.

If that doesn't produce the desired response, keep the suspect awake, revisit him periodically and engage him in small talk. He will almost certainly bring up subjects relating to the charges, such as, "When will I go to court?," "What about bail?," "When can I see a lawyer?," and so forth. You can discuss these things with him and if he edges over into the facts of the crime, he has "initiated" and thereby rescinded his request for counsel.

If these hypothetical provisions in the next edition of Inbau et al. become reality, there will be virtually nothing left of *Miranda*'s right to counsel. That right is rarely invoked today; it would almost never be effectively invoked under the regime envisioned above.

An *Edwards* violation cannot be ignored in determining "initiation."

Petitioner and amici argue that *Oregon v. Elstad*, 470 U.S. 298 (1985), applies to violations of *Edwards v. Arizona*. *Elstad* held that obtaining a voluntary self-incriminating statement in violation of *Miranda* did not necessarily preclude a subsequent interrogation in compliance with *Miranda* or render inadmissible the results of a *Miranda*-warned interrogation. The subsequent *Miranda* warning "serves to cure the condition that rendered the unwarned statement inadmissible." 470 U.S. at 311. Just how *Elstad* would apply to *Edwards* violations is, however, left unclear. The Criminal Justice Legal Foundation's Amicus Brief argues that just as a "*Miranda* violation does not taint a knowing and intelligent waiver . . . then questioning contrary to *Edwards* should not taint a subsequent decision to initiate a conversation with the police" (p. 19). The Foundation even argues that "a prior *Edwards* violation has no bearing on whether the suspect did in fact subsequently initiate contact with the police." (*Id.*) This cannot possibly be so. The very concept of "initiation" carries with it the idea of self-generation, beginning, first-step: "(a) to begin or set going: make a beginning of: perform or facilitate the first actions, steps or stages of . . . (b) to bring about the initial formation of: originate." Webster's Third New International Dictionary of the English Language (Unabridged) (1993). Whether a conversation is "initiated" necessarily requires an examination of what transpired beforehand – whether the conversation is responsive to earlier acts or conversations or was generated within the psyche of the initiator rather than triggered or stimulated by police forces or suggestions.

Determining whether an interrogation subsequent to an invocation of the right to counsel was "initiated" by the suspect is not always easy. But to attempt to answer that question while disregarding a *Miranda/Edwards* violation, i.e., a prohibited "interrogation," would be mindless.

A three-part analysis

There are several potential causes for a suspect who has asserted his right to counsel to change his mind. They fall into three categories:

1. *Influences consistent with "initiation."* Telephonic or other contact with the suspect's family or even an attorney can trigger a change of mind. So can conversations with other inmates in the jail, impatience with delays in getting to court or in getting to see an attorney. A suspect could begin to worry that criminal associates are implicating him with the police and perhaps "cutting a deal" to his disadvantage. Presumably, any such influences, if not generated by the police in an effort to stimulate an "initiation," do not undermine or prevent an "initiation" by the suspect.

2. *Police-dominated influences short of interrogation.* Another group of potential influences could include information, ideas or circumstances produced by the police. These would include, as in this case, reading of the charges or informing the suspect that an associate has implicated him as the "shooter" or the instigator of the crime. They could include statements by the police about the advantages of early cooperation, about the need to "initiate" if the suspect changes his mind about counsel, the disadvantages of "lawyering up," and so forth.

3. *De facto interrogation*. A third category of potential influences are those constituting de facto "interrogation," acts and statements the likely effect of which is to produce an incriminating response.

One source of confusion in efforts to understand and apply *Edwards*, reflected in the briefs of petitioner and amici, as well as court decisions, is the relevance of the second type of influences. These are influences controlled by the police that have a tendency to produce suspect statements which may have the appearances of "initiation." Surely, however, if the police influences tending to produce an "initiation" are strong enough, there is no true "initiation" and a subsequent interrogation would violate *Edwards* even though no prohibited "interrogation" preceded the putative "initiation."

Several propositions emanate from this analysis:

First, whether the suspect "initiated" conversations with the police about the charges after invoking his right to counsel is a complex question, different from but related to whether the police engaged in prohibited interrogation prior to the alleged "initiation."

Second, since the basic question underlying a claim of "initiation" is what actually animated or motivated the suspect to reopen conversations with the police about the crime, it is possible that a suspect who was illegally interrogated in violation of *Edwards* could nonetheless have thereafter "initiated" the conversations. The court below acknowledged this. It is even possible to imagine that improper post-invocation interrogations could actually strengthen a suspect's resolve to insist on consulting counsel but thereafter a family member could have advised him that it was in his best interests to try to talk

himself out of trouble and to do it now before it was too late. Knowing these facts, a court could perhaps conclude that the suspect "initiated" and that a subsequent interrogation was consistent with *Miranda* and *Edwards*. If so, petitioner is right that an interrogation in violation of *Edwards* does not always preclude an "initiation" by the suspect. Clearly, however, whenever an alleged "initiation" follows closely upon an "interrogation," as it did here, a strong inference arises that there was no suspect initiation in any meaningful sense. There should be a very heavy burden on the prosecution to prove that the interrogation had no causal effect on the "initiation." There was no effort to meet such a burden in this case. Rather, the prosecution relied solely on the ambiguous remarks of Detective Johns. Those remarks, in context, could even have been part of a plan or practice to manipulate respondent into reconsidering his request for counsel. Intentionally or otherwise, the interplay between Officer Reese and Detective Johns was reminiscent of "Mutt and Jeff," and the trial judge noted that resemblance (JA 362).

Third, in determining if the suspect "initiated" a conversation with the police, it is appropriate to consider not only whether the police improperly "interrogated" him, as in this case, but also whether they influenced him to "initiate" a conversation. Just as an "interrogation" does not necessarily preclude a subsequent "initiation" by the suspect, the absence of "interrogation" does not guarantee that a subsequent conversation was initiated by the suspect. If there has been no illicit interrogation, it may be appropriate to presume that a putative initiation by the suspect was what it appears to be. It should be possible, however, to show that in fact the putative initiation was manipulated by the police, using ploys and pressures to

produce an "initiation" which manipulations nonetheless fell short of "interrogation." An "initiation", it should be noted, is not necessarily an "incriminating response." Police actions likely to lead to an "initiation" are not necessarily likely to lead to "self incrimination." Hence, police efforts to engineer an "initiation" of conversations can be more subtle than efforts constituting functional interrogation. It is in this sort of inquiry that allegedly "curative" statements or actions by the police have a bearing. Anything the police say to discourage the suspect from reconsidering his decision to consult counsel should be weighed against anything they said and did to encourage him to reconsider. If, weighing all such influences, it is clear that the motivation for reopening conversations emanated from non-police sources, then the suspect "initiated" the conversations.

Fourth, the appropriate legal standards are trinary: (1), Not only "must all interrogation cease" when the suspect requests counsel, (2), so also should efforts to get the suspect to reconsider and "initiate" new conversations. (3), Should the suspect reopen conversations about the crime, a "waiver" should be recognized only if the apparent initiation was substantially the result of influences independent of police activities (other than those incidental to custodial conditions) between the invocation of counsel and the alleged initiation.[3] Any less demanding burden on the prosecution is inconsistent with respect for the suspect's decision to consult counsel.

[3] Under this analysis, it is not necessary to agree with the court below that respondent was functionally "interrogated." Its holding that respondent did not "initiate" a waiver of counsel would still be correct.

More than knowledge of rights is involved

Petitioner contends that all that is needed to cure an interrogation that violates *Miranda/Edwards* is a statement by the police that even though they have just violated their duty in that regard, it is still the suspect's "choice whether to talk to the police, and the police intend . . . to honor that choice" (p. 30). This argument presupposes that the only thing to be "cured" is the implicit suggestion in the de facto interrogation that the suspect's decision to remain silent may not be respected without further efforts to engage him in conversation. But that is only part of the wrong that needs correction: the police have attempted to trigger a reconsideration of the suspect's decision by imparting new "information," some of which is false, some of which may be true, and coupling that with a suggestion that he should reconsider. Merely reassuring the suspect at that point that he has a right of silence cannot establish that his subsequent conversations were the result of his own "initiation."

The amicus brief of the United States suggests that a sufficient curative statement "would have to convey the message that there would be no further police-initiated questioning without counsel while the suspect remained in custody" (p. 16). While nothing remotely like that was said to respondent in the present case, we disagree with the United States that this would be sufficiently curative, since it would not blot out or erase the influence of the erroneous information imparted to respondent or the strong suggestion by officer Reese that respondent should change his mind and "talk now." It would simply send the message that if respondent wished to reconsider talking in light of these new pressures, he will have to be the initiator. If such a message were legally "curative" of improper

interrogation, it could be delivered as part and of the initial interrogation itself, as our hypothetical new police manual might well suggest. It would probably encourage waivers of counsel rather than discourage them. Virtually nothing would be left of *Edwards*. The only curative message that should suffice is one that actually removes or retracts previously conveyed suggestions, implicit or explicit, that the suspect should reconsider. A mere offer to now honor the suspect's request for counsel (unless he initiates a conversation), after having already dishonored that request once, is not responsive to the problem the police created by their pressures for reconsideration. If the police were to say to the suspect, "We agree with you. It is not in your interest to talk to us until you see an attorney and we will not talk to you any more until you see an attorney," *that* would be a curative statement! Had there been such a statement, this case would not be here.

CONCLUSION

For the foregoing reasons, the NLADA respectfully submits that this Court should either dismiss the writ of certiorari as improvidently granted or affirm the decision of the court below.

STEVEN B. DUKE
Counsel of Record

JO-ANN WALLACE
CHARLES WYNDER
Of Counsel

August, 2005

(12)

No. 04-373

Supreme Court, U.S.
FILED
SEP - 8 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

On Writ of Certiorari To The Court of Appeals of Maryland

REPLY BRIEF FOR PETITIONER

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. LISIC
DIANE E. KELLER
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

TABLE OF CONTENTS

Page

REPLY ARGUMENT 1

A. A Fourth Amendment causation analysis is not the appropriate test for a violation of *Edwards*'s prophylactic rule 1

B. The issue of "initiation" requires de novo review ... 4

C. Allowing proper consideration of curative measures maintains the protections of *Edwards* and strikes an appropriate balance between competing concerns 7

D. Subsequent events cured Officer Reese's improper comment, terminated the police-initiated interrogation, and allowed Blake to initiate further communications with the police 9

1. Detective Johns's actions after Officer Reese's improper comment were sufficient to convey to a reasonable suspect that he had a genuine choice to speak to the police and that the police intended to honor that choice 10

2. Even under a causal connection test, the taint of Officer Reese's comment was purged 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases:

Arizona v. Fulminante, 499 U.S. 279 (1991) 4

Arizona v. Mauro, 481 U.S. 520 (1987) 5

Arizona v. Roberson, 486 U.S. 675 (1988) 3, 11

Brown v. Illinois, 422 U S. 590 (1975) 4, 14

Chavez v. Martinez, 538 U.S. 760 (2003) 2

Connecticut v. Barrett, 479 U.S. 523 (1987) 3

Davis v. United States, 512 U.S. 452 (1994) 2, 12

Dickerson v. United States, 530 U.S. 428 (2000) 2

Edwards v. Arizona, 451 U.S. 477 (1981) ..... 1, passim

Hernandez v. New York, 500 U.S. 352 (1991) 5

Holman v. Kemna, 212 F.3d 413 (8th Cir.),
cert. denied, 531 U.S. 1021 (2000) 6

Maine v. Taylor, 477 U.S. 131 (1986) 5

McNeil v. Wisconsin, 501 U.S. 171 (1991) 2

Miller v. Fenton, 474 U.S. 104 (1985) 6

Page

Minnick v. Mississippi, 498 U.S. 146 (1990) 10

Miranda v. Arizona, 384 U.S. 436 (1966) ..... 2, passim

Missouri v. Seibert, 124 S.Ct. 2601 (2004) ..... 2, passim

Moran v. Burbine, 475 U.S. 412 (1986) 7

Oregon v. Bradshaw, 462 U.S. 1039 (1983) ..... 3, passim

Oregon v. Elstad, 470 U.S. 298 (1955) ..... 2, passim

Oregon v. Hass, 420 U.S. 714 (1975) 9

Ornelas v. United States, 517 U.S. 690 (1996) 6

Smith v. Illinois, 469 U.S. 91 (1984) 8

State v. Conover, 312 Md. 33 (1988) 14

Taylor v. Alabama, 457 U.S. 687 (1982) 2

Thompson v. Keohane, 516 U.S. 99 (1995) 5

United States v. Gomez, 927 F.2d 1530
(11th Cir. 1991) 6

United States v. Michaud, 268 F.3d 728
(9th Cir. 2001), *cert. denied*, 537 U.S. 867 (2002) 6

United States v. Whaley, 13 F.3d 963
(6th Cir. 1994) 6

Page

Constitutional Provisions:

United States Constitution:

Fourth Amendment 1, 2

Fifth Amendment 2

Rule:

Maryland Rules of Procedure:

Rule 4-212 14

Miscellaneous:

2 The Oxford English Dictionary (2d ed. 1991) 3

Webster's II New Riverside University Dictionary (1988) 3

REPLY BRIEF FOR PETITIONER

Blake concedes that an improper comment by the police after invocation of the right to counsel does not preclude a suspect from initiating further conversation pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981). Resp. Br. at 14, 20-22. He concedes that subsequent events, such as curative measures and intervening circumstances, can be considered in determining whether the suspect initiated further communication. *Id.* Blake disagrees with Maryland, however, as to the proper analysis for determining whether a curative measure is sufficient to allow a suspect to initiate further conversation. The test proposed by Maryland is whether a curative measure conveys to a reasonable person in the suspect's shoes that he has a choice whether to speak to the police and that the police will honor that choice. When that test is met, the purpose of *Edwards*'s prophylactic rule to prevent badgering is satisfied. If the suspect then initiates further communication, a court can proceed to determine the voluntariness of any subsequent statement by the suspect.

Blake's contention that Detective Johns did not cure the impropriety here fails for several reasons. First, he erroneously proposes a Fourth Amendment causation analysis, which is not appropriate for a violation of *Edwards*'s prophylactic rule. Second, he applies an inappropriate standard of review for determining initiation. Third, he mistakenly argues that Maryland's position would eviscerate *Edwards*. Fourth, he misconstrues the effect of the curative measures in this case.

A. A Fourth Amendment causation analysis is not the appropriate test for a violation of *Edwards*'s prophylactic rule.

Blake places great reliance on the suppression court's finding that his initiation of contact with the police was in direct response to Officer Reese's improper comment. This

focus on the "causal connection" between Officer Reese's comment and Blake's initiation is an application of the test used to determine whether evidence obtained after a Fourth Amendment constitutional violation is admissible. *See Taylor v. Alabama*, 457 U.S. 687, 690 (1982). It is not the proper analysis for a violation of the prophylactic rule established in *Miranda v. Arizona*, 384 U.S. 436 (1966), much less for a violation of *Edwards*'s additional layer of prophylaxis.

"[V]iolations of judicially crafted prophylactic rules do not violate the constitutional rights of any person." *Chavez v. Martinez*, 538 U.S. 760, 772 (2003) (plurality opinion). Although *Miranda* is "constitutionally based" in that it protects the Fifth Amendment right against compelled self-incrimination, *Dickerson v. United States*, 530 U.S. 428, 440 (2000), it is a prophylactic rule in the sense that, at times, it will preclude admission of "statements that are otherwise voluntary within the meaning of the Fifth Amendment." *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). In *Elstad*, this Court explained that the causal connection test, or "fruits" analysis, developed for a constitutional violation of the Fourth Amendment is inapplicable to a procedural *Miranda* violation. *Id.* at 306-09. *Accord Missouri v. Seibert*, 124 S.Ct. 2601, 2610 n.4 (2004) (Souter, J., plurality opinion); *id.* at 2616-17 (O'Connor, J., dissenting).

Edwards is a "second layer of prophylaxis for the *Miranda* right to counsel." *Davis v. United States*, 512 U.S. 452, 458 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991)). A violation of *Edwards*'s prophylactic rule, therefore, is not by itself a constitutional violation. Thus, the causal connection test, or "fruits" analysis, which was rejected in *Elstad* where there was no constitutional violation, 470 U.S. at 306-09, similarly should be rejected in the *Edwards* context. Just as the issue in *Elstad* was not whether the earlier,

unwarned statement may have psychologically prompted Elstad to make a later, warned statement, *id.* at 312, so too here, the issue is not whether Reese's improper interrogation may have psychologically affected Blake's decision to later initiate communication with Johns.

A prophylactic rule must be justified by reference to its purpose. *See Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). The purpose of *Edwards* is to prevent police badgering, to prevent a waiver of rights that has come at the authorities' "behest" and "insistence." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988).[1] Subsequent events, such as curative measures and intervening circumstances, can dissipate the risk of police badgering and permit a finding that an accused initiated further contact with the police.

In determining the efficacy of curative measures, the proper test is whether curative measures after an improper police comment neutralize the comment by conveying to a reasonable person in the suspect's shoes that it is his choice whether to speak to the police and that the police will honor that choice. Where the curative measure conveys that the suspect has a "genuine choice" whether to speak to the police, *see Seibert*, 124 S.Ct. at 2612 (plurality opinion), the purpose of *Edwards* is satisfied. If the suspect then "evince[s] a willingness and a desire" to talk about the investigation, *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983) (plurality opinion), as Blake clearly did here, he has "initiated" further

---

[1] "Behest" is defined as a "command, injunction, bidding," 2 The Oxford English Dictionary 75 (2d ed. 1991), and as "an authoritative command: order," Webster's II New Riverside University Dictionary 163 (1988).

conversation under *Edwards* and the presumption of involuntariness is inapplicable.

The suppression court erred in applying a causal connection analysis. Thus, the court's finding that Blake's statement was in direct response to Officer Reese's remark, (JA. 359-60), is not dispositive regarding the issue of initiation. Indeed, the suppression court misapplied even the causal connection test. In declaring that the State had to prove that Blake's waiver was "in no way due" to the improper interrogation, (JA. 363), the suppression court appeared to apply a "but for" analysis. This Court has made clear that the causal connection test does not embrace a "but for" rule, even where constitutional violations, as opposed to prophylactic rules, are concerned. *Brown v. Illinois*, 422 U.S. 590, 603 (1975). *Cf. Arizona v. Fulminante*, 499 U.S. 279, 285 (1991) ("but for" test not standard for determining voluntariness of a confession). Blake's reliance on the suppression court's causal connection finding is misplaced.

B. The issue of "initiation" requires de novo review.

Blake contends that the determination whether the accused initiated further contact with the police is "a simple factual question," which is entitled to deferential review. Resp. Br. at 12, 15-19. Contrary to Blake's assertion, however, the issue of initiation is more than a simple question regarding "who said what first." *Bradshaw*, 462 U.S. at 1051 (Powell, J., concurring). Particularly here, where the question is whether, and under what circumstances, subsequent events can be found to cure an improper police comment and allow a suspect to initiate contact, the issue is a mixed question of fact and law that is subject to de novo review.

Reviewing courts apply the deferential clearly erroneous standard to purely factual findings. *Hernandez v. New York*, 500 U.S. 352, 366 (1991); *Maine v. Taylor*, 477 U.S. 131, 145 (1986). Issues of fact encompass "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995) (internal citations and quotation marks omitted). By contrast, "[s]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations . . . are not facts in this sense." *Id.* at 110 (internal citation and quotation marks omitted).

In *Thompson*, 516 U.S. at 112, this Court held that the determination of custody for *Miranda* purposes is a mixed question of law and fact requiring independent review. It did so because the Court applied an objective test to resolve the inquiry whether a "reasonable person" would have felt at liberty to terminate the interrogation. *Id.* This inquiry "calls for application of the controlling legal standard to the historical facts." *Id.* Important to the Court's decision was that a reasonable person analysis does not require an assessment of credibility and demeanor. *Id.* at 113-14. In addition, the Court noted that judges make "in custody" assessments "with a view to identifying recurrent patterns, and advancing uniform outcomes." *Id.* at 113 n.13. In this way, "independent review potentially may guide police, unify precedent, and stabilize the law." *Id.* at 115. Similarly, a determination whether a suspect has initiated contact after an improper police comment, which under the State's proposed test requires a reasonable person analysis, is a mixed question of fact and law requiring de novo review.[2]

---

[2] Other determinations regarding the admissibility of a confession likewise require de novo review. *See Arizona v.*

The Maryland Court of Appeals thus applied the wrong standard of review in determining whether Blake initiated further contact. To be sure, the court noted that federal circuit courts have split on the proper standard of review,[3] and it purported to uphold the lower court's ruling under either standard. (JA. 416). But the court actually reviewed the suppression court's ruling on the pertinent inquiry for clear error. (JA. 417) ("Judge North's conclusion that Detective Johns's remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous."). In applying a clearly erroneous standard, the court erred.

Mauro, 481 U.S. 520, 528 n.6 (1987) (whether actions constituted interrogation reviewed de novo); *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (issue whether confession is voluntary requires independent review); *see also Ornelas v. United States*, 517 U.S. 690, 699 (1996) (determination of reasonable suspicion and probable cause reviewed de novo).

[3] *Compare Holman v. Kemna*, 212 F.3d 413, 417 (8th Cir.) (stating, in habeas corpus case, that presumption of correctness is accorded to facts found by state court, but whether facts constituted "initiation" under *Edwards* was legal question requiring de novo review), *cert. denied*, 531 U.S. 1021 (2000), *and United States v. Whaley*, 13 F.3d 963, 968 (6th Cir. 1994) (whether facts, considered together, constituted "initiation" was legal question to be reviewed de novo), *with United States v. Michaud*, 268 F.3d 728, 737 (9th Cir. 2001) (whether accused changed her mind and initiated conversation is factual question), *cert. denied*, 537 U.S. 867 (2002), *and United States v. Gomez*, 927 F.2d 1530, 1539 n.9 (11th Cir. 1991) (same).

C. Allowing proper consideration of curative measures maintains the protections of *Edwards* and strikes an appropriate balance between competing concerns.

Blake is wrong in arguing that Maryland's proposed test allowing police to cure an impropriety would "map out an end run around *Miranda*'s requirements," Resp. Br. at 28, and "eviscerate" *Edwards*'s protection, *id.* at 30. The analysis Maryland proposes is consistent with *Edwards*.

Maryland's proposed test maintains *Edwards*'s presumption of involuntariness unless, as is currently the law, the suspect initiates further contact with the police. It merely allows consideration of all the circumstances in determining whether a suspect initiated contact, as opposed to a per se rule that an improper police comment after invocation of the right to counsel precludes a suspect from changing his mind and initiating further contact. The requirement that curative measures effectively give a suspect a "real choice" whether to speak to the police, *see Seibert*, 124 S.Ct. at 2610, satisfies the purpose of *Edwards* to prevent police badgering. At the same time, it retains the suspect's choice whether to speak to the police, *see Moran v. Burbine*, 475 U.S. 412, 426 (1986) (*Miranda* gives the suspect "the power to exert some control over the course of the interrogation"), and it recognizes the value to society in allowing the admission of uncoerced confessions, *see id.* (admissions of guilt are more than merely "desirable," they are essential to society's compelling interest in finding and convicting violators of the law).

Indeed, although Blake disparages Maryland's proposed test, his approach also requires a case-by-case analysis of all the facts. He concedes that curative measures can be taken into account, and he points to a variety of factors that are relevant to a determination of initiation — "a gap in time, a break in

custody, a promise by officers to respect an invocation of counsel." Resp. Br. at 14.

Allowing consideration of subsequent events, such as curative measures and intervening circumstances, as Blake concedes is proper, would not "invite exploitation and circumvention" by police officers. NACDL Br. at 15. The police have little to gain by attempting to exploit such a rule because the risks that a subsequent statement would be ruled inadmissible, risks outside the control of the police, are substantial.

Interrogation after invocation of the right to counsel could result in suppression of a subsequent statement under several scenarios. For example, if officers wrongly initiate interrogation after a request for counsel, and the suspect gives a statement before curative measures are taken, the statement would be inadmissible in the State's case in chief under *Edwards*. Moreover, if a statement is made after curative measures are taken, the police will nevertheless run the risk that a reviewing court would find that the curative measures were insufficient to cure the initial *Edwards* impropriety.

Even if a court finds a curative measure sufficient to allow a suspect to initiate contact, this merely makes the *Edwards* presumption of involuntariness inapplicable; it does not automatically make the ensuing statement admissible because a reviewing court must still determine the validity of the waiver under the totality of the circumstances. *Smith v. Illinois*, 469 U.S. 91, 95 (1984). By engaging in interrogation after invocation of the right to counsel and then attempting to cure the impropriety, the police run the risk that a reviewing court will find, under the second step, that the interrogation was so coercive as to render the ensuing statement involuntary and

therefore inadmissible for any purpose. *See Oregon v. Hass*, 420 U.S. 714, 723 (1975).

Accordingly, it is not true that the police have "nothing to lose" by continuing to interrogate a suspect after invocation of the right to counsel. Resp. Br. at 29. Under any of the above scenarios, police interrogation would result in the loss of the ability to use a subsequent statement by a suspect who decided that he wanted to talk to the police and then initiated further communications. *See Edwards*, 451 U.S. at 490 (Powell, J., concurring) ("It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk."). A court's ability to consider subsequent curative measures will not give the police incentive to violate *Edwards*.

D. Subsequent events cured Officer Reese's improper comment, terminated the police-initiated interrogation, and allowed Blake to initiate further communication with the police.

Whether this Court applies Maryland's test, which looks to whether the police honored the suspect's rights and gave him a real choice whether to speak without counsel, or applies Blake's causal connection test, events subsequent to Officer Reese's comment cured the impropriety. Blake's choice to speak to the police, therefore, was initiation pursuant to *Edwards*.

1. Detective Johns's actions after Officer Reese's improper comment were sufficient to convey to a reasonable suspect that he had a genuine choice to speak to the police and that the police intended to honor that choice.

There is no dispute that Blake initiated communication with Johns in the "dictionary sense." *Bradshaw*, 462 U.S. at 1045. Almost a half hour after the prior encounter, Blake posed the question to Detective Johns, "I can still talk to you?" — a question showing not only that he felt no compulsion to speak, but that he was not even sure he would be allowed to speak. In determining whether this actual initiation of conversation should be considered initiation within the meaning of *Edwards*, the question is whether a reasonable suspect in Blake's shoes would have understood that he had a genuine choice whether to speak to police and that the police would honor that choice. The facts in this case, taken together, demonstrate that the answer is plainly yes.

First, Detective Johns immediately terminated questioning when Blake invoked his right to counsel. (JA. 21). Second, unlike *Edwards*, where the suspect was told "he had" to talk with the police, *Edwards*, 451 U.S. at 479, or *Minnick v. Mississippi*, 498 U.S. 146, 149 (1990), where the suspect was told he "could not refuse" to talk, there was no such police badgering in this case. Third, immediately after Officer Reese's brief comment, Detective Johns declared: "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." (JA. 23). Detective Johns then pushed Officer Reese out of the cellblock area. (JA. 23, 240).[4]

[4] In addition, prior to making a statement, Blake was again advised of, and waived, his *Miranda* rights, (JA. 27-30; State's Exhibit 2), and he explicitly confirmed that he had changed his mind about his desire to talk to the police, (JA. 33-36; State's Exhibit 5).

These circumstances lead ineluctably to the conclusion that a reasonable person in Blake's position would have understood that he had a genuine choice to speak to the police and that the police intended to honor that choice. Blake's subsequent decision to speak with the police was initiation under *Edwards*. This is so regardless of whether Blake's initiation was, in part, a response to Officer Reese's remark.[5]

Blake argues that impermissible interrogation cannot be cured with words, Resp. Br. at 24; that "mere repetition of *Miranda* warnings is insufficient to remedy an *Edwards* violation," Resp. Br. at 23; and that "[a] promise, once broken, can rarely be repaired with yet more promises," Resp. Br. at 26. Maryland is not suggesting that a mere recitation of the *Miranda* warnings, by itself, would cure an improper police comment after invocation of the right to counsel. *See Roberson*, 486 U.S. at 686 (administration of new *Miranda*

[5] Blake contends that the suppression court found that the "primary" reason Blake initiated contact was because of Officer Reese's comment. Resp. Br. at 17. This misstates the record and ignores a key reason that Blake changed his mind about speaking with the police. Blake testified at the suppression hearing that when he read the complete charges, he saw for the first time that Tolbert said that Blake shot the victim, took the car keys from the victim's pocket, and ran over the victim while leaving the scene. (JA. 215-217). Blake stated that Tolbert was the one who did those things, that he, Blake, felt angry and betrayed, and that he wanted the police to know the truth. (JA. 217-218). The suppression court credited this testimony in its findings. (JA. 365).

warnings insufficient to dispel presumption of coercion). When a suspect has been given *Miranda* warnings, invoked his right to counsel, and then been subjected to interrogation despite his invocation, he might assume, despite readvisement of *Miranda* warnings, that the police have no intention of respecting his choice not to speak to the police without counsel. *See Davis*, 512 U.S. at 472-73 (Souter, J., concurring in the judgment) (when a suspect's request for counsel is ignored, in contravention of the rights recited, "he may well see further objection as futile and confession . . . as the only way to end his interrogation"). Here, there was nothing remotely suggesting that further objection would be futile. Detective Johns's immediate, forceful response to Officer Reese's comment was much more than the mere recitation of *Miranda* rights; it made clear that the police intended to honor Blake's choice and would not seek to question him without counsel present.

Moreover, Detective Johns, the lead detective who initially gave Blake his *Miranda* warnings, did not break any promise. He complied with *Edwards* by terminating questioning when Blake invoked his right to counsel. (JA. 20-21). When Officer Reese made an improper comment, Detective Johns immediately admonished the patrol officer and pushed him out of the cell. (JA. 23). Detective Johns's decisive words and actions, even if not formally directed at Blake, Resp. Br. at 30, conveyed to Blake, as they would to any reasonable person, that Blake's choice whether to speak with the police would be respected.

The purpose of *Edwards*'s prophylactic rule, therefore, was satisfied. Applying the test set forth by this Court in *Seibert* and *Elstad*, Detective Johns cured the impropriety in Officer

Reese's remark. Blake's subsequent request to speak with Detective Johns was initiation under *Edwards*.[6]

2. Even under a causal connection test, the taint of Officer Reese's comment was purged.

Even if this Court adopts a causal connection test, that Blake's statement was in direct response to Officer Reese's comment, (JA. 359-360), is not dispositive. As explained in Section A, the suppression court, in applying a causal connection test, erroneously applied a "but for" analysis. (JA. 363). The causal connection test does not embrace a "but for" rule. Rather, it considers other factors to determine whether the

---

[6] Whether there was initiation is the only question before this Court; the second step of the analysis, voluntariness under the totality of the circumstances, has been determined by the Maryland Court of Special Appeals. Blake is wrong in stating that the Maryland Court of Special Appeals "reversed the trial court solely on the theory that Officer Reese's comment did not amount to interrogation." Resp. Br. at 7. The intermediate court recognized that, based on its finding that Officer Reese's comment did not constitute interrogation, there was no presumption of involuntariness and that, therefore, it had to determine, under the totality of the circumstances, whether the statements were voluntary. (JA. 382 n.3). The court reversed the circuit court's order suppressing Blake's statements, (JA. 388), thereby necessarily, albeit implicitly, finding the statements voluntary.

Blake did not challenge this finding in Maryland's highest court, and the voluntariness issue has not been presented in this Court. Thus, if the Court finds that Blake initiated contact, the Maryland appellate court's implicit finding that the statements were voluntary under the totality of the circumstances stands.

initial taint has been purged, including the temporal proximity of the illegality and the confession, the presence of intervening circumstances, and "the purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 603-04. Applying these factors compels the conclusion that the taint from Officer Reese's remark was purged and that Blake's initiation was an independent act of free will.

With respect to temporal proximity, Blake did not make a statement immediately after Officer Reese's remark. Although the time period before Blake asked to speak with the police was not long, approximately a half hour, (JA. 25-26), it gave Blake time to consider his choices.

More significant to the analysis is the second factor, the presence of intervening circumstances. As indicated, Detective Johns's immediate response to Officer Reese's comment neutralized the remark and made it clear that the police would honor Blake's choice whether to speak to the police without counsel. In addition, Blake admitted that, after learning for the first time that his co-defendant was pinning the blame for the murder on him, (JA. 215-17, 355-56), he wanted the police to know the truth. (JA. 218).[7] And Blake's statement was made

---

[7] Blake did not argue, for good reason, that it was improper to present him with the charging document, including the application for statement of charges that contained reference to Tolbert's statement that Blake shot the victim. As the Maryland courts correctly noted, Maryland Rule 4-212(e) requires the police to serve on a defendant a copy of the warrant and charging document promptly after arrest. (JA. 364-65, 382 n.4, 385, 413). *Accord State v. Conover*, 312 Md. 33, 42-43 (1988) (application for statement of charges treated as part of charging document under Maryland rule).

to Detective Johns, out of Officer Reese's presence. (JA. 25, 189). Thus, although the Maryland Court of Appeals focused solely on whether there was a break in custody or significant lapse of time, (JA. 417), there were other significant intervening circumstances here.

Finally, with respect to the last factor, Officer Reese's comment was not flagrant misconduct.[8] Indeed, the appellate courts of Maryland were in disagreement whether it was improper at all. *Compare* (JA. 357-358, 396) (functional equivalent of interrogation) *with* (JA. 388) (not interrogation).

Moreover, Blake's suggestion that Officer Reese's comment was an intentional police strategy, Resp. Br. at 29, is unavailing. Although the intent of the police is not relevant to the analysis, *see Seibert*, 124 S.Ct. at 2612 n.6 (plurality opinion); *id.* at 2617-19 (O'Connor, J., dissenting), the record belies any assertion of an intentional police strategy. Detective Johns expressly denied that this was a preconceived plan, (JA. 24), and the suppression court found him to be a credible witness, (JA. 361). Detective Johns's immediate admonition to Reese, (JA. 23), his anger at the statement, and his reporting of the incident to his supervisor, (JA. 23-25), rebut any suggestion of a coordinated plan.

---

[8] There is no basis for Blake's suggestion that Officer Reese's statement implied that Blake's refusal to speak with officers made it more likely that he would receive the death penalty. Resp. Br. at 27. The statement implied no such thing. And Detective Johns's response in no way made it "plain" that Blake had made an incorrect choice to request counsel and that he was going to suffer the consequences of a potential death penalty. Resp. Br. at 28.

Reviewing all of the circumstances, including curative measures and intervening circumstances, shows that the taint of Officer Reese's comment was purged. Blake's initiation of contact was an independent act of free will. Although Maryland submits that the proper analysis is that set forth by this Court in *Elstad* and *Seibert*, under any test, the facts in this case demonstrate that Blake initiated further communication with the police pursuant to *Edwards*.

CONCLUSION

For the reasons stated herein, and in the State of Maryland's principal brief, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. LISIC
DIANE E. KELLER
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

September 8, 2005